NAVAL WAR COLLEGE

INTERNATIONAL LAW DECISIONS AND NOTES

1923

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PREFACE

The discussions upon questions of international law before the class of 1923 at the Naval War College, Newport, R. I., were, as in recent years, conducted by George Grafton Wilson, LL. D., professor of international law at Harvard University.

The problems submitted to the class and their subsequent discussions required the interpretation of certain treaties about which there is a difference of opinion and involved points of law upon which there have been as yet no judicial decisions. For this reason it is considered inexpedient to publish this matter at the present time.

The 1923 volume of International Law Documents is a compilation, made by Professor Wilson, of decisions of various prize courts that are considered to be of special interest and value to officers of the naval service. The subject matter has been considered at the war college; but, as is evident from the text, the contents consist of recent tribunal decisions only and are therefore not directly representative of the work of the war college.

C. S. Williams,
Rear Admiral, U. S. Navy,
President, Naval War College

January 1, 1925.

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INTERNATIONAL LAW: DECISIONS AND NOTES

PRELIMINARY NOTE

In International Law Decisions and Notes published by the Naval War College in 1922 attention was called to the departure during the World War from precedent, owing to the changed character of warfare. Nearly all the cases reprinted in the volume of 1922 were decided during the period of actual hostilities, and showed the influence of the exceptional conditions under which the war was conducted. It was also stated that other decisions would receive attention at the Naval War College.

Many of the decisions printed in this volume have been rendered since the World War, and show a tendency to conform more closely to established precedents, though there are frequent departures from these precedents. The points of view taken in these decisions vary somewhat according to the nationality of the courts, even when the courts are purposing to interpret the same law. This is somewhat fully shown in the cases showing the status of vessels as influenced by ownership, charter, and service. This matter has in recent years become of growing importance, and practice has been far from uniform. (See pp. 101.)

In cases in which decisions were rendered in a foreign language, the language of the court is official, and the translations here given are for convenience of reference, but as the systems of jurisprudence differ it is not always possible to give exact translations. Appreciation is due to those who have aided in making these translations.

With the development of international law the decisions of all courts will have value as precedents, and with the growth of the practice of referring disputes to international tribunals common standards will be recognized.

This volume includes cases from different national courts and from mixed commissions.

The cases are from the official reports unless otherwise indicated and are usually arranged in chronological order under each topic.

VESSELS: OWNERSHIP, CHARTER, AND SERVICE[a]

THE "HAELEN"

June 28, 1918

(2 Entscheidungen des Oberprisengerichts in Berlin, 177)

In the prize matter concerning the Belgian steamer *Haelen*, home port Antwerp, the imperial superior prize court in Berlin, in its session of June 28, 1918, decided:

The appeal against the judgment of the imperial prize court in Kiel of March 13, 1918, is dismissed with costs.

Statement of the facts.

Reasons: The Belgian steamer *Haelen*, en route from Montreal to Rotterdam, was brought to on November 3, 1917, by a German submarine within the German barred zone in the North Sea, and brought in to Swinemunde for closer examination. Seizure in prize ensued on November 26, 1917, through authorized agents of the admiralty staff. The vessel had a cargo of wheat for the Commission for Relief in Belgium, consigned to Rotterdam, and was possessed of a safe conduct pass, from the Swiss consul general in Montreal, which assures safe passage to vessels sailing to the account of the Commission for Relief in Belgium. A condition that the vessels shall take a course outside of the barred zones is adjoined to the privilege; otherwise they lose the right to claim special treatment.

Safe conduct.

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[a] At the meeting of the International Conference on Maritime Law in 1922 the leading maritime countries of the world were represented. The matter of the status of state-owned and state-charted vessels was considered, and the following resolution was unanimously adopted:

1. Sovereign states, in regard to ships owned or operated by them and cargo owned by them, and cargo and passengers carried in such ships, ought to accept all liabilities to the same extent as a private owner.

2. Except in the case of the ships and cargoes mentioned in paragraph 3, such liabilities should be enforceable by the tribunals having jurisdiction over and by the procedure applicable to a privately owned ship or cargo or the owner thereof.

3. In the case of—

(*a*) Ships of war; (*b*) other vessels owned or operated by the Sovereign State and employed only in governmental noncommercial work; (*c*) state-owned cargo carried only for the purpose of governmental noncommercial work in ships owned or operated by the soverign state.

Such liabilities should be enforceable only by the like tribunals but only of the state by which the ships is owned or operated, and should be enforceable by action *in personam* against such state, and in addition, by any other form of procedure permitted by the law of such state.

Claim was raised by the owners of the *Haelen* for the release of the ship and indemnity, also for loss of freight; and by the Commission for Relief in Belgium for the release of the cargo or for compensation. The claim was based on the ground that the vessel, being intrusted with a philanthropic mission, according to article 6c of the Prize Code, was not subject to capture.

Judgment of Kiel prize court.

By the judgment of the prize court at Kiel of March 13, 1918, the claims were dismissed, and the condemnation of the vessel and its cargo decreed. The prize court adopted the opinion that the premises of article 6c of the Prize Code did apply to the vessel, but that the privilege arising therefrom had been forfeited because the vessel, in addition to its philanthropic mission, had pursued other purposes in the war area for the benefit of our enemy, and had for this reason traversed the barred zone.

Against this judgment, both claimants have appealed. Whereas the owners have maintained their claims, as made in the first instance, the representative of the second claimant explained in the oral proceedings before the court of appeal that the major portion of the cargo of wheat of the Commission for Relief in Belgium had been refunded in kind. The claim was therefore only to be retained on behalf of the remainder of the cargo. Reimbursement is demanded for the value of the wheat in Canada, with the addition of freight and expenses to Europe. The claimants assert that it was only the bad weather which necessitated the captain's departure from the prescribed course. In the zone traversed, there had been neither occasion for any investigation in the interest of the enemy, nor intention on the part of the captain. In the court of second instance, a deposition, made under oath by the captain of the *Haelen* before the district court in Rotterdam, is presented, in which the allegations made the basis of the appeal are corroborated.

The imperial commissioner before the superior court has moved that the appeals may be dismissed.

In the decision from which appeal is made, the judge of first instance goes upon the assumption that the steamer *Haelen*, as incontestably enemy-owned, was subject to capture unless the protection of article 6c of the Prize Code is to be accorded it. The latter would follow of necessity, if the vessel, in the prosecution of the voy-

age in question, was charged with a philanthropic mission. The prize court assents to this proposition, provided that the sole purpose of the *Haelen* was to convey a cargo of wheat to Rotterdam for the Commssion for Relief in Belgium, which would inure to the benefit of the civil population of Belgian and French occupied territory. It further assumes that by the mere fact of having traversed the war zone, the ship did not forfeit the protection of article 6c of the Prize Code, because the proclamation of a part of the North Sea as a blockaded area made no change in the prize provisions, and, specifically, created no new grounds for seizure in prize. The vessel only forfeited the protection of article 6c of the Prize Code if in addition to its declared philanthropic mission, it was pursuing other purposes in traversing the barred zone, especially if it intended to collect certain information for the enemy. That such was the intention of the captain of the *Haelen* in the present case, the judge of first instance regards as proved on the basis of the ascertained facts, without, however, specifying what definite belligerent purpose the vessel was pursuing by its voyage through the war zone. His main argument is that it is not evident what other reason could have induced the captain to expose his vessel to the great danger involved in traversing the barred zone, as his statement that he was forced to do so on account of heavy weather assumed, in view of the ascertained condition of the weather, the guise of a pure evasion; just as his behavior after the capture revealed his conscious guilt.

Philanthropic mission.

War zone.

The imperial superior prize court can not join in these considerations. It may be conceded to the judge of first instance that if the captain of the *Haelen* intended to assist the enemy's conduct of the war, his vessel would have lost the protection of article 6c of the Prize Code on this ground alone. But sufficient basis for such a conclusion is not given.

The statements of the captain are certainly not calculated to justify the voyage of the vessel. He may in truth have had sufficient reason for not making his way *north* of the Faroe Islands, as had been prescribed, for otherwise he would have exposed his vessel to the full lateral force of the northwesterly storm, which manifestly prevailed at the time he approached the Faroe Islands. The vessel was not very seaworthy in heavy weather, and was listing badly besides. But the situation

Deviation from course.

changed when he reached the southern point of the Faroe Islands. With the diminishing wind it was now possible to steer to the northeast under the protection afforded by the islands to the northwest, and thus even now avoid the barred zone. For, as the map with the records shows, there is between the southern point of the Faroe Islands and the edge of the barred area an adequate passage open to traffic. In neglecting to take this route, and even on the following day making no attempt to get out of the barred zone by a northerly course, but, on the contrary, continuing his course from the southern tip of the Faroe Islands in an easterly and southeasterly direction, the captain was no longer compelled by necessity so to do, but was acting according to his voluntary decision. The motive behind this, however, does not need to be regarded in the light of espionage, which under the circumstances is highly improbable. A much more proximate cause was the wish to shorten the voyage, and the southern tip of the Faroe Islands once reached, to avoid the circuitous route around the war zone, undesired from the beginning on account of the condition of the vessel. In another case, the captain of a relief ship met in the barred zone frankly gave as the reason for his course of action that he thought he "would get by once again." A similar thought may have determined the captain in this case. Looked at from this point of view, the subsequent conduct of the captain is explained. For, after he had, by his inconsiderate act, exposed the vessel intrusted to him to the serious risks of the war zone, contrary to his instructions, it was to his own interest to destroy evidence which would have incriminated him even in the eyes of those by whom he was commissioned. Specifically, the destruction of the log, containing the record of his course, the erasure of the course from the map, and the expression of the wish that the vessel might strike a mine, are explicable on this theory. If he had really made any observations of value to the enemy, that he should have entered these in his log, as the judge of first instance surmises, is highly improbable. In that case, moreover, he would doubtless have destroyed the book, even before the visiting officer came on board. Then, too, the latter, who examined the log, noticed no entries of this sort.

Suspicious conduct of captain.

If, in accordance with what has been said, the conclusions which the judge of first instance draws from the behavior of the captain do not appear valid, the judg-

ment itself must be sustained on a different ground. The latter concerns the point of departure of the argument of the prize court, according to which, navigating within the war zone, in and of itself, had no influence upon the application of article 6c of the Prize Code. This view can not be concurred in.

Eleventh Hague convention.

The provision of article 6c is borrowed from Convention XI of the Hague conference. It is based upon a proposal of the Italian delegate, which originally contained two clauses. The first of these set up the principle later adopted in the convention, while the second contained a provision that the enemy state which wishes to set forth a vessel for the purposes alluded to must notify its opponent to that effect. On his part, the latter must grant a safe conduct, in which he must specify the conditions under which he will grant the vessel this privileged treatment (*"indiquant les conditions de l'exemption"*).

The ninth session of the *Comité d'examen* dealt with the proposal. That the general principle required certain restrictions, such as had found expression in the proposal of the Italian delegate, met with no opposition. Difference of opinion arose only as to the formal requirement of a safe conduct, and as to the consequences if the vessel had not obtained one.

Under these circumstances, the fact that finally only the clause expressing the general principle was incorporated into the convention does not justify the assumption that it was intended to deny the competence of the belligerent state to specify in detail the conditions under which it would concede to the vessels concerned the privilege assured to them in the convention. As a matter of fact, the unlimited application of the general principle would lead to untenable consequences. If, for instance, one were to regard it as sufficient that a ship be conveying food to the inhabitants of occupied territory, in which scarcity of food prevailed, the necessary consequences would be that one would have to give safe passage to enemy vessels as well, if they were conveying necessities of life to the enemy's territory under the same assumptions. This proves that the principle can not have been conceived as broadly as might be assumed from the wording. On the contrary, the idea which was put forward in the deliberations, to wit, that the application of the general principle requires greater precision in special cases, must be regarded as applicable especially in the

case of vessels which, like the one in question, are dedicated to philanthropic missions only during the war, occasionally, and not permanently even in time of peace.

English decisions.

English decisions also take this point of view. A German vessel engaged in taking women and children from the fortress of Tsingtau to Tientsin was seized as prize. The prize court in Hongkong held the capture was legal, adopting the opinion that the vessel was not charged with a philanthropic mission in the sense of article 4 of the eleventh Hague convention. If, so the court reasoned, such a situation was meant to be covered by the Hague convention, the provision in question would not be couched in such vague and indefinite terms. On the contrary, such a contingency would have been provided for expressly and unambiguously. Were one to put as broad a construction on the expression "philanthropic mission" as did the plaintiff, it would lead to serious consequences, which could not possibly have been intended by the wording of the article. (Cf. case of the *Paklat*, 1 Trehern, British and Colonial Prize Cases, 515.) Thus, the English courts, too, adopt the view that an unlimited application of that general principle, at least as regards enemy ships, is not within the meaning of the provision.

As a matter of fact, then, shipping for the relief commission takes place not only under the protection of article 6c of the Prize Code, but on the basis of an agreement between the German Government and the interested neutrals, which is embodied in the safe conduct which every relief ship must have with it on both the outbound and return voyage. In this safe conduct, several conditions are set up, whose fulfillment is designated as the premises of preferential treatment. Moreover, it contains a clause to the effect that the safe conduct has reference solely to the high seas outside of the war zones. In view of the history of the origin of article 6c of the Prize Code given above, it must be assumed that vessels which, contrary to prescriptions of their safe conduct, traverse the blockaded areas, not only expose themselves to the danger of destruction connected therewith, but forfeit the benefit of article 6c of the Prize Code as well.

Conditions of safe passage.

Since, as has been shown, the captain of the *Haelen* was not compelled by any urgent necessity, tantamount to *force majeure*, to traverse the barred zone, he has

forfeited the right to special treatment, in accordance with what has been said of this claim. Therefore, his vessel, together with its cargo, is subject to the general provisions of prize law, namely, inasmuch as both were admittedly of enemy ownership at the time of capture, condemnation. Notwithstanding this, the major part of the cargo, as the records show, and as substantiated by the representative of the Commission for Relief in Belgium, has in the meantime been restored to the commission. Whether grounds of equity argue in favor of extending this concession to the rest of the cargo as well is a question which does not lie within the competence of the prize court, but is rather to be decided by the proper authorities of the Government.

The judgment is therefore affirmed. The decision on the question of costs is conditioned by section 37 of the prize court rules.

THE "WAUBESA"

(American Maritime Cases, 1923, p. 659)

United States of America, as owner of steamship *Waubesa*, libellant, *v.* City of New York, as owner of ferries *Queens* and *Mayor Gaynor*, respondent, and cross libel, etc.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

May 3, 1923

Statement of the case.

Augustus N. Hand, D. J.: This case involves a collision between the steamship *Waubesa*, belonging to the United States, and the ferryboats *Queens* and *Mayor Gaynor*, belonging to the city of New York. The collision occurred on March 17, 1919, in New York Harbor, during a dense fog. The *Waubesa* was anchored at or near the anchorage grounds in the upper bay to the southwest of Bedloes Island.

The United States appeared specially and filed a plea to the jurisdiction to the effect that the *Waubesa* was not employed as a merchant vessel but was engaged in the European food relief service, which is alleged to be a purely governmental function.

Libels.

In the first libel the United States sues to recover for damages caused the *Waubesa* by the collision, and the city of New York files a cross libel alleging that the collisions were due to the negligence of those in charge

of the *Waubesa* in that the latter was anchored in the channel way and in that she did not ring her bell as required by law so as to notify vessels of her position at anchor.

The second libel is filed by the Grain Corporation against the city of New York, and alleges that the libellant shipped on board the *Waubesa* grain in good order and condition to be carried from New York to European ports, that the *Waubesa*, with libellant's cargo on board, took up anchorage on the general anchorage grounds at a point to the south and east of the Statue of Liberty in New York Harbor, where the municipal ferries *Queens* and *William J. Gaynor* negligently collided with her, to the damage of the merchandise belonging to the Grain Corporation. The city of New York impleaded the United States as the one primarily liable, claiming the right to sue it under the provisions of the act of March 9, 1920.

In the third libel, the United States Grain Corporation, organized under the laws of the State of Delaware, alleges that the *Waubesa* was a general ship engaged in the common carriage of merchandise by water for hire and was being operated under the control and direction of the United States Shipping Board Emergency Fleet Corporation; that the Grain Corporation shipped rye grain on the *Waubesa* in good order and condition to be carried from Philadelphia to Falmouth, England; that the *Waubesa* instead of proceeding to Falmouth, put in to the port of New York, having oil and water in the bilges, and being in such a condition that it was deemed best by those in charge of her not to proceed upon her voyage to Falmouth; that the cargo of grain was discharged in the port of New York not in good order and condition as when shipped, but seriously injured and damaged by contact with fuel oil and sea water, for all of which damages are sought. The United States is made respondent under the act of March 9, 1920, in place of the *Waubesa* and the Emergency Fleet Corporation, and the city of New York is impleaded under the admiralty rule on the ground that it is primarily responsible for the alleged damage.

[The court here reviews the evidence upon the question of liability for the collision and concludes that the city of New York is liable owing to the fact that the ferryboats which struck the *Waubesa* were being navigated

in the fog at an improper speed, estimated as 7 to 8 knots.]

The claim that the city of New York can not limit its liability because its regulation for the municipal ferries contravened the inland rules seems to me without merit. Regulation 26 reads as follows:

Regulations.

"In a fog, mist, falling snow, or heavy rainstorms, boats must run at half speed, or less, having careful regard to the existing circumstances and conditions. If the weather is so thick or foggy that the regular advertised schedule can not be maintained with safety to the ferryboats they will be run slowly and cautiously without regard to the schedule and proceed with great care and caution."

Article 16 of the inland rules says:

"Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions."

It is contended that the words "boats must be run at half speed or less" suggest running at half speed under unsafe conditions. I see no ground for this. Each regulation prescribes a caution and a limitation of speed dependent on the circumstances. It might as well be argued that the municipal regulation imposed greater moderation rather than less. In my opinion the two regulations are equivalents. There is no proof that the city rule was not made in good faith. The words of the Supreme Court in *La Bourgoyne*, 210 U. S. at p. 126 are applicable:

"* * * The petitioner having shown the promulgation of regulations for the conduct of its business, which exacted a compliance by the captains of its vessels with the international rules, we think the burden of proving that the rules were not promulgated in good faith or that a willful departure from their requirements was indulged in, and was brought home to or countenanced by the petitioner, was cast upon the claimants, and that the court properly held that that burden was not sustained by the evidence."

In my opinion the municipal regulations, while differently phrased, were in entire accordance with the inland rules, and the city sustained the burden imposed by law of proving the absence of privity in respect to undue speed in a fog.

Seaworthiness.

The Grain Corporation contends that the ship was unseaworthy because oil leaked from the tank and got into the grain and that for this reason the exceptions in the bill of lading and under the Harter Act are not applicable.

[The court here reviews the evidence upon this point, and concludes as follows:]

It seems clear, therefore, that oil which had leaked from the tanks caused the damage in holds 1 and 2, and that the collision and the resulting beaching of the vessel contributed to this damage.

The suit by the Grain Corporation against the United States is for failure to deliver the grain shipped and receipted for in good order in accordance with the terms of the bill of lading. As Goble, the master (deposition, p. 13) and Glen, the inspector for the United States Shipping Board (minutes, p. 82), both said, the trip was really a trial trip, though the voyage for which the cargo was shipped was from Philadelphia to Falmouth. The vessel left Philadelphia with oil in her bilges under the protest of her engineer, and in substance that of her master also (Goble deposition, p. 8). The soundings, however inaccurate, showed a large amount of oil in her bilges, and this oil, when the vessel listed as a result of the accident, damaged the grain in holds 1 and 2. It seems clear that the vessel should not have left Philadelphia under such circumstances and that she was unseaworthy for the carriage of grain. Moreover, the trial trip was a deviation by an unseaworthy vessel that deprived the *Waubesa* of the benefit of the exceptions in the bill of lading and the provisions for exemption of the Harter Act. *The St. Paul* (1921), 277 Fed. 99; *The Elizabeth Dantzler* (1920), 263 Fed. 596. The *Waubesa* was not definitely proceeding on her voyage, but only going to New York and then on in case she was found fit and after she was satisfied that the oil could be pumped out and did not imperil the cargo. New York was not a port of refuge, but a stopping place for convenience on a trial trip, which, irrespective of the delay caused by the collision, proved to be a stopping place of long duration because of the condition of the vessel. I can hardly see a more fit application for the doctrine of deviation.

Deviation.

Liability.

Under such circumstances if the vessel were not Government owned the Grain Corporation could recover damages to her cargo and the owner of the *Waubesa*

would have the right to recover over from the city of New York the total damages to the grain caused by water in holds 4 and 5 and one-half of damages caused by oil in holds 1 and 2. The city could limit in all cases.

The United States has filed exceptions to the jurisdiction because:

(1) The *Waubesa* was not employed as a merchant vessel, but was engaged in public business;

(2) The libel is for the sole benefit and account of private underwriters;

(3) The policies of insurance issued by underwriters were issued to an agency of the United States. Hence the underwriters are not in a position to sue; Jurisdiction.

(4) Any money paid by underwriters should inure to the benefit of the United States.

In order to establish that the *Waubesa* was not employed as a merchant vessel, but was engaged in public business, counsel for the United States has introduced documentary proof that the Grain Corporation was incorporated by the United States in pursuance of an Executive order and that by Executive orders the President managed the corporation and arranged for an increase and decrease of its capital stock; that the Government owned the stock of the corporation and that by Executive order its liquidation was provided for and the assets were to be paid into the Treasury of the United States. The Government also showed that the Grain Corporation in delivering the grain shipped on the *Waubesa*, which was shipped under a bill of lading providing for delivery to the order of the United States Grain Corporation, care of American Embassy, London, was really engaged in the relief of the starving countries in the East and not in mercantile business. The case of *The Western Maid* (1922), 257 U. S. 419, is relied upon. That vessel, like the *Waubesa*, was owned by the United States and was engaged in transporting foodstuffs for the relief of the civilian population of Europe. The Supreme Court said (Mr. Justice Holmes writing for the majority, p. 431): Public business.

"* * * It is suggested that the *Western Maid* was a merchant vessel at the time of the collision, but the fact that the food was to be paid for and the other details adverted to in argument can not disguise the obvious truth, that she was engaged in a public service that was one of the constituents of our activity in the war and its

sequel and that had no more to do with ordinary merchandizing than if she had carried a regiment of troops."

The same view was taken by the Supreme Court in the recent case of *United States Grain Corporation* vs. *Phillips*, 1923 A. M. C. 312, 43 Sup. Ct. Rep. 283, 67 L. Ed. 342, Feb. 19, 1923, where a naval officer carried gold from Constantinople to New York on the steamship *Laub*, a destroyer in the Navy. This gold was being forwarded on the *Laub* in payment by Bulgaria for wheat furnished by the Grain Corporation, and the captain of the *Laub*, under a statute applicable to shipments by private persons or corporations, claimed a commission for the carriage of the gold. The court said that in substance the gold was the property of the United States and while the legal title was in the Grain Corporation and the property of that corporation might have been taken to pay a judgment rendered against it, yet the property was clothed with such a public interest "that the transportation of it no more could be charged for by a public officer than the carrying of a gun, we must look not at the legal title only but at the facts beneath forms."

The counsel for the Grain Corporation endeavors to distinguish these cases on the ground that in the case at bar the Grain Corporation employed its own assets in purchasing the grain instead of carrying grain as in the *Western Maid* purchased with funds appropriated directly by Congress; that it also insured the grain, as is not done in a direct government transaction, and paid freight to the *Waubesa* and received bills of lading therefor. The proof shows, however, that the object of the governmental activities was the relief of Europe and that any profit over cost which the Grain Corporation may have made was only for the purpose of paying interest on moneys advanced to purchase supplies to relieve the famine-stricken countries. I can not regard the distinctions as sufficient to take the case out of the sweeping decisions in *The Western Maid* and *United States Grain Corporation* vs. *Phillips, supra.*

Insurance.

Advances by the underwriters to cover damage to the grain cargo have been made in consideration that "best endeavors to recover the value of the flour * * * from any and all persons and corporations who may be liable therefor" would be exercised. Such a clause can not, however, create a right on the part of the Grain Corpora-

tion against the United States when the latter has not by appropriate legislation consented to be sued. The *Western Maid* and the case of *United States Grain Corporation* vs. *Phillips* preclude any such result. Whether or not the warranty in the insurance policies that the insurance shall not inure directly or indirectly to the benefit of the carrier is sufficient to avoid the insurance in this case because of the fact that the United States Grain Corporation, as well as the United States Emergency Fleet Corporation, really belong by reason of stock ownership to the United States, is not a matter for determination in this litigation. I can not see that these warranties, or the clause in the loan receipts that "the Grain Corporation shall use its best endeavors to recover the value of the flour * * * from any and all persons and corporations who may be liable therefor * * *" can affect the rights of the parties here.

While it is true that if the *Waubesa* had under the meaning of the decisions been a "merchant vessel" the damages suffered by the Grain Corporation would have been divided as between the city of New York and the United States, yet the Grain Corporation itself would have been entitled to recover the whole of its damages against either wrong doer. *The Beaconsfield,* (1895) 158 U. S. 303. The English rule that owners of the cargo could only recover one-half of their damages from each party does not apply in our courts. *Ralli* vs. *Societa Anonima di Navigazione* (1915), 222 Fed. 944, at page 998. Inasmuch, however, as neither the United States nor the *Waubesa* are liable to suit, the Grain Corporation may prove its full damages against the city of New York subject to the right of the latter to limit. In proof of its claim against the surrendered vessels, or their proceeds, the claim for damages of the United States for injuries to the *Waubesa* should be deferred to the claim of the Grain Corporation since the *Waubesa* was unseaworthy and guilty of a deviation. *The George W. Roby,* 6th C. C. A., 1901, 111 Fed. 601.

Decision.

In the first libel an interlocutory decree is granted to the United States against the city of New York with right of the latter to limit damages to proved value of surrendered vessels. The cross libel of the city of New York against the United States of America is dismissed for want of jurisdiction.

In the second libel brought by the United States Grain Corporation against the city of New York, an interlocutory decree is granted to the libellant, with the right to the city of New York to limit the amount of damages to proved value of the surrendered vessels. The petition impleading the United States of America is dismissed for want of jurisdiction. There are two claimants to the same fund in the foregoing libels, namely, the United States and the United States Grain Corporation, and the causes have all been tried together. For the reasons hereinbefore stated the claim for damages of the United States for injuries to the *Waubesa* should be deferred to the claim of the Grain Corporation since the *Waubesa* was unseaworthy and guilty of a deviation.

The third libel brought by the United States Grain Corporation against the United States of America is dismissed for want of jurisdiction and the petition by the United States of America impleading the city of New York is dismissed.

Settle decrees on notice.

THE "CONNER"; THE "ESPERANZA"

(American Maritime Cases, 1924, p. 1170)

New York & Cuba Mail Steamship Co., libellant, *vs.* United States of America, respondent, and cross libel

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

July 29, 1924

WINSLOW, D. J.: These are cross suits in admiralty—one brought by the New York & Cuba Mail Steamship Co., owner of S. S. *Esperanza*, against the United States, owner of the torpedo-boat destroyer *Conner*, and by the United States against the S. S. *Esperanza*, to recover damages arising from a collision between the *Esperanza* and the *Conner* on February 15, 1918, off Barnegat.

By act of Congress approved February 28, 1923, jurisdiction was conferred upon this court to hear and determine the suit and to enter a judgment or decree "upon the same principles and measures of liability as in like causes in admiralty between private parties." (67th Cong., Private Act No. 192.)

The facts material to the determination of the issues, not disputed, are as follows:

Facts of the case.

The *Esperanza*, with passengers and cargo, left Brooklyn at 3.05 p. m., February 14, 1918, bound for Cuban and Mexican ports. At 7.55 she passed Scotland Light, her course being S. by W. ½ W. This course was maintained until off Sea Girt, when it was changed to S. by W. ¼ W., and later was changed to S. by W. At 10.25 p. m., the weather having thickened, the engines were put half speed and fog signals were sounded at regular intervals. At 10.30 fog shut in and speed was reduced to slow. About 10.40 the speed was reduced to dead slow—3 to 4 knots, "just steerage way." The *Esperanza's* fog whistles, in the meantime, were blown at regular intervals. At 12.08 a. m., February 15, ship's time, while running at dead slow on a course S. by W., the fog signal of another vessel was heard about three points on the starboard bow of *Esperanza*. The master and second officer were on the bridge and a lookout stationed on the forecastle head. The fog signal was heard and reported by the lookout, whereupon the *Esperanza* blew a regular blast of her fog whistle. The captain then took the whistle cord and blew three fog whistles at approximately three-quarter minute intervals. No whistle was heard from the *Conner* during this time. Then a loud whistle was heard from the *Conner* and, at the same time, she broke out of the fog, apparently coming at high speed and almost immediately struck the *Esperanza* a glancing blow on her starboard side, thence disappearing in the fog under the *Esperanza's* stern. An inspection disclosed that the *Esperanza* was able to make port without assistance and she put about, heading toward New York, where she arrived February 15, at 12.32 p. m.

The *Conner*, a new torpedo-boat destroyer, left Philadelphia February 14, 1918, for Newport, R. I., under orders to make test runs of 12.16, and 20 knots, using the cruising combination of her turbines. Ten minutes prior to the termination of the 12-knot test, at 9.30 p. m., February 14, a dense fog shut in, which continued until the collision. The 12-knot test was terminated at 9.40 p. m., when the engines were shifted to high-pressure combination, but no change was made in the *Conner's* speed of 12 knots.

The *Conner* passed Five Fathom Bank Lightship at 7.20 p. m. about 100 yards on her port beam. From there her course was made at 34° true. Her course and

speed of 12 knots were held until the collision occurred. The *Conner's* commander testified that at 12.12 a. m. February 15:

Testimony of *Conner's* Commander.

"I heard a sound * * * This sound attracted my attention on the ground that it might be a fog signal. I inquired and found no one else on the bridge had heard anything which sounded like a fog signal. I gave immediate orders to exercise unusual diligence in listening and to sound our own signal, so that if this sound had been a fog signal we would have given an immediate response to the other vessel. Our signal had just been sounded when, through the fog, came a loud, piercing fog signal of a steam vessel under way on our port bow. I immediately called out 'Stop the engines' and, being the nearest person to the engine-room telegraph shoved them myself to the stop position and got the stop signal back from the engine room."

The commander further says that—

"The only thing which was seen at first was a string of white lights, nothing to indicate the heading of a vessel or her character."

He thereupon ordered "hard right" to the steersman and—

"just after that a green light appeared close under the bow and the *Conner* struck a glancing blow against some large vessel."

It may be noticed that the *Conner's* engines were ordered stopped and her helm put "hard right" before either of the *Esperanza's* side lights came into view. The engines were not reversed nor her headway checked and she continued on, striking the *Esperanza* on the starboard side, glancing off and passing under the *Esperanza's* stern and disappearing in the fog.

The litigants do not agree as to the place of the collision. The commander of the *Conner* fixes it at about 12 miles from Barnegat buoy. The *Esperanza* fixes it at 3 miles southeast of Barnegat buoy.

Owing to the fact that no suit could be brought, due to lack of the court's jurisdiction, until after the act of Congress some five years after the collision, the depositions could not be taken earlier. Owing to the lapse of time, only two depositions of *Esperanza's* witnesses were produced—that of the master of the *Esperanza* and of the second officer, both of whom were in extremely feeble health. There was also received in evidence, how-

ever, the record of the proceedings of the investigation on board U. S. S. *Arkansas*, February 16, 1918, made pursuant to order of the commander of the Battleship Force 2, United States Atlantic Fleet. There is also in evidence the record of the investigation held by the Steamboat Inspection Service at the office of the local inspectors in New York on February 28, 1918.

In determining the question of responsibility, the conduct of each vessel will be considered separately. The International Rules adopted for the purpose of preventing collisions provide that the regulations to that end "shall be followed by all public and private vessels of the United States upon the high seas."

International rules.

"ART. 16. Every vessel shall in a fog, mist, falling snow, or heavy rainstorm, go at a moderate speed, having careful regard for the existing circumstances and conditions."

That these rules govern the navigation of a war vessel in time of war has been distinctly held by this court.

Watts vs. *U. S.*, 123 Fed. 105. This case arose out of a collision between the U. S. S. *Columbia* and the *Foscolia* during the Spanish-American War. It was contended that the *Columbia* was proceeding at an immoderate speed in fog, the speed, however, being 6 knots. The Government contended that the failure of a war vessel to obey the navigation rules during war time was excusable. The court refused to agree with this contention. In the act which authorized the present suit it is provided, among other things, that the issues shall be determined "upon the same principles and measures of liability as in the cases in admiralty between private parties."

The *Conner* was under a duty to observe the rule as to moderate speed in like manner as a privately operated ship in the admittedly dense fog.

In a recent case, in which Judge Ward wrote the opinion, not yet reported (*N. Y. & Porto Rico S. S. Co.* vs. *Director General*, June 3, 1924) the definition of a dense fog is given as the obscuration of objects 1,000 feet away or less.

Some evidence in the instant case is that the fog was so thick that the lookout on the *Conner's* bow could not be seen from her bridge 50 feet away. Commander Howe, a most excellent witness, described the visibility as "between 50 and 100 yards."

"Moderate speed."

What is a moderate speed, is of course a relative term, but it has been the subject of frequent comment and determination.

The Colorado, 91 U. S. 692, 702; *The Nacoochee*, 137 U. S. 330, 339.

Mr. Justice Brown, in *The Umbria*, 160 U. S. 404, stated the rule as follows:

"The general consensus of opinion in this country is to the effect that a steamer is bound to use only such precautions as will enable her to stop in time to avoid a collision, after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law."

And, again, in *The Chattahoochee*, 173 U. S. 540, Mr. Justice Brown again referred to the rule, using the following language:

"No absolute rule can be extracted from these cases. So much depends upon the density of fog and the chance of meeting other vessels in the neighborhood, that it is impossible to say what ought to be considered moderate speed under all circumstances. It has been said by this court in respect to steamers that they are bound to reduce their speed to such a rate as will enable them to stop in time to avoid a collision after an approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law" (p. 548).

Ordinarily, it would hardly be debatable that a speed of 12 knots in a fog of the density which prevailed at the time of the collision in the instant case would be wholly unwarranted and immoderate. Indeed, many times this court has held that a very much less speed than 12 knots is an immoderate speed.

The Columbia (*supra*); *The H. F. Dimock*, 77 Fed. 226; *The Hilton*, 213 Fed. 997; *The Rosaleen*, 214 Fed. 252.

The Government contends, however, that the *Conner* was justified in proceeding at 12 knots because of her tremendous backing power, which would enable her to stop in a shorter distance than ordinary vessels. Her maximum speed was upwards of 30 knots. It is quite apparent that, whatever the backing power of the *Conner* may have been, it was of no avail here. That speed in this dense fog brought her into collision in a few seconds, before her engine power could even be brought into play. The distance that the ships were visible to

each other in the fog and the speed at which they were approaching and traversing the space between them are the real factors in the present problem. How futile is engine power in stopping or reversing if the colliding vessels are upon each other in a few seconds of time before the power can be brought into play!

In *The Manchioneal*, 243 Fed. 801, the Circuit Court said:

" * * * Speed is always excessive in a vessel that cannot reverse her engines and come to a standstill before she collides with a vessel that she ought to have seen, having regard to fog density." (Citing cases.)

In *The Haven*, 277 Fed. 957, the court said:

"A vessel navigating in a fog must go no faster than will permit her to stop within the distance she can see ahead" (p. 959).

In *The City of Norfolk*, 266 Fed. 641, the court said:

"In such navigation 'moderate speed' means speed so slow that a vessel can be stopped within the distance at which another vessel can be seen."

At the rate of 12 knots, the *Conner* was making approximately 1,300 feet per minute, or 300 feet in about 15 seconds. According to the witnesses, the boats, when visible to each other, were at most not over 150 to 300 feet apart. According to the commander's testimony, it would have been impossible to stop the *Conner's* speed of 12 knots at the point when they became visible. It may be speculation to endeavor to estimate what might have been done had the *Conner* been proceeding slower, but we are dealing with what actually happened at a speed which the court believes was highly excessive under the circumstances with the known result.

In the case of *Watts* v. *U. S.* (*supra*) the warship *Columbia* was proceeding at about 6 knots per hour. The vessel with which she collided, the *Foscolia*, was not seen by anyone on the *Columbia* until she was within 75 yards.

The *Esperanza* claims that the *Conner* was further at fault in failing to obey further provisions of article 16 of the International Rules, wherein it is provided that—

"A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision is over."

This rule is, of course, applicable to the *Esperanza*, as well as to the *Conner*. In view of the excessive speed of the *Conner*, which I believe was the proximate and contributing cause of the collision, the *Experanza's* failure to wholly stop her engines recedes in importance. It is not clear that the *Conner* heard the *Experanza's* first fog signal, although the commander says he heard a sound he thought might be a fog signal. Although his sense of hearing indicated that it might be a fog whistle, no change of speed took place. In *Lie* v. *San Francisco & Portland S. S. Co.*, 243 U. S. 291, the master of the *Selja* attempted to excuse his failure to stop as required by article 16 by saying that when he first heard the faint signal from the approaching vessel he thought it might be a foghorn on the shore. The court, however, overruled the *Selja's* contention and held that the provisions of article 16 were mandatory and required all vessels to stop their engines immediately. The same argument, however, as to the duty of the *Esperanza* might be applied to her, unless the circumstances of the case do not so admit. Neither of the navigators was free to substitute his judgment for the positive requirements of the rule. A former navigation rule vested the navigator with a degree of discretion. The present rule is mandatory and is positive law. It is also true that the position of a vessel whose fog signal is heard must be ascertained before proceeding. Three elements are involved, indeed, before proceeding—bearing, distance, and course. Whatever we might say, however, in regard to the duty to stop, it seems to me that the paramount negligence—indeed, the proximate cause, of the collision—was the excessive speed of the *Conner* and her failure to observe the rule regarding speed in fog. It is admitted by the commander of the *Conner* that had her speed been 4 knots, the collision would not have occurred. The 12-knot speed had continued for quite a time before the collision, and brought her swiftly to the point of collision.

Mandatory rule.

In view of the court's conclusion, I do not deem it necessary to consider the question as to whether the *Conner* was at fault for changing her course before the position and course of the *Esperanza* had been ascertained. The commander of the *Conner* hard aported his helm as soon as the *Esperanza's* "string of lights" broke into view, and he admitted that in so doing he "gambled" on the *Esperanza's* course. However, I think it is proper

to conclude that the error, if it was error, was committed at the moment of collision and may be regarded with less strictness than one committed when the vessels are more distant from each other. In like manner, reference might be made to the alleged contention that the *Conner* was at fault for failing to reverse her engines. This contention, however, is of interest more particularly because the *Conner* contends that she was justified in maintaining a speed of 12 knots, because of her tremendous backing power. That tremendous backing power—which was not exercised at the moment of crisis—disposes of the argument that the speed was excusable. The potential power was neither brought into play, nor in all human probability could it have had any effect in avoiding the collision, if used. In considering the responsibility of the *Esperanza*, the court does not deem it necessary to consider the charge that she was navigated by persons not wholly competent. The evidence is to the contrary, and this contention requires no consideration; but the question as to whether or not the *Esperanza* should have stopped her engines when she heard the fog signal of the *Conner* requires consideration.

For more than an hour prior to the collision the evidence satisfies the court that the *Esperanza* had been making perhaps 3 knots, which was barely steerageway. Not only was that the testimony of the *Esperanza's* witnesses, but it is also supported by the *Esperanza's* engine-room slate. "The ship was turning over just as slow as the engine can be turned."

Burden.

Assuming that the burden also rests upon the *Esperanza* of showing not merely that her failure to stop her engines when she heard the signal of the *Conner* might not have been one of the causes, or, rather, that it could not have been one of the causes of the collision, the record convinces me that that burden has been sustained. Had she stopped her engines, she would have lost steerageway entirely and "could not have been maneuvered." The failure of the *Esperanza* to stop her engines, assuming that it was her duty so to do, could not have been one of the causes of the collision. It was the gross negligence on the part of the *Conner* which accounts for the collision. In *The City of New York*, 147 U. S. 72, at p. 85 Mr. Justice Brown said:

"Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is of itself

sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel."

The *Conner* did not stop her engines when the commander "thought" he heard a whistle when proceeding at 12 knots, nor yet did he reverse his engines at any time either before or after the *Esperanza* became visible. He did, however, change his course. It now appears that had the rudder been put over exactly the opposite way, it would have "worked out better," as the commander said. However, these acts were done *in extremis*, and ought not to be considered faults of navigation.

Judgment.

The excessive speed of the *Conner*, particularly in its relation to the bare steerageway of the *Esperanza*, leads me to the conclusion that the total stoppage of the *Esperanza's* engines would not have prevented the collision, nor yet did that failure on her part in any way contribute to it. The *Esperanza*, at her speed, would have moved a negligible distance in the time that the *Conner* would have traversed a very considerable distance. The relation between two moving objects with differences of speed such as those two vessels is similar to the relation of an almost stationary object and a moving object.

The negligence of the *Conner* continued to operate as an efficient cause until the moment of the collision.

The libel of the United States against the S. S. *Esperanza* should be dismissed, with costs, and a decree will be entered in favor of the libellant.

THE "MUDROS"

May 2, 1918

(2 Entscheidungen des Oberprisengerichts in Berlin, 87)

In the case of the steamer *Mudros* the imperial superior prize court, in its session of May 2, 1918, has decided that the complaint of the imperial commissioner in Hamburg against the decree of the prize court of that place of May 18, 1917, must be rejected as inadmissible.

Reasons:

Statement of the facts.

The steamer *Mudros* was before the war a German merchant vessel and was lying in an Italian port at the time when Italy entered the war. The Italian Government later requisitioned the vessel and handed it over to the Italian State Railways for their use. It sailed under

Requisition by foreign government.

the Italian flag, and on such a voyage was sunk in mi ocean by a German submarine. The case came before the prize court in Hamburg, which denied its competence inasmuch as it lacked proof that the vessel had lost its German character.

The judgment itself is to the point even if the considerations noted, upon which it rests, can not be concurred in. The *Mudros* should have been regarded as a public vessel of Italy at the time of sinking, and should have been treated accordingly. In accordance with Article 2 of the Prize Code, vessels employed in services of the state, under the control of the state, are reckoned as public vessels, and public vessels of the enemy are forfeited without further formality under the laws of war. The suppositions mentioned were present in the case of the *Mudros*, she having been requisitioned by the Italian Government and employed for purposes of state under the Italian flag. On *this* ground, overtures for judicial proceedings before the prize court must in truth be refused.

Public vessel.

The complaint of the imperial commissioner, therefore, requires no actual change in the decision attacked. Inasmuch, however, as the prize court rules only take cognizance of judicial methods by which a decision as such can be attacked, the complaint must be rejected.

THE "SAO VICENTE"

(295 F. 829)

Transportes Maritimos Do Estado *v.* T. A. Scott Co. (Inc.)

CIRCUIT COURT OF APPEALS, THIRD CIRCUIT

January 9, 1924

WOOLLEY, Circuit Judge: The question brought here on this appeal, broadly stated, is whether the District Court lost its jurisdiction in admiralty on a suggestion of immunity of a foreign sovereign from suit. The general rule exempting a government, sovereign in its attributes, from being sued without its consent is not disputed. *Porto Rico* v. *Rosaly*, 227 U. S. 270. The real question in the case is whether the sovereign, under the circumstances, gave or withheld its consent.

The steamship *Sao Vicente* stranded on Packet Rock, Sconticut Point, Mass. She was floated and delivered at New Bedford by the T. A. Scott Co. Later she made

Statement of facts.

her way to New York Harbor where, incurring debts for repairs and supplies and failing to pay them, she was arrested under several libels filed in the District Court of the United States for the Southern District of New York and under this libel filed in the District Court of the United States for the District of New Jersey. Being represented in several suits by the same proctors who pursued in each suit the same line of defense, the proceedings in some of the actions are, in the main, the same, and, to a certain extent, the questions raised are likewise the same. Hence, we refer to the opinion of the Circuit Court of Appeals for the Second Circuit in *The Sao Vicente*, 281 Fed. 111, for a statement in detail of proceedings which, with the quoted pleadings, are, in a measure, similar, *mutatis mutandis*, to those in the case at bar.

We shall discuss the law applicable to the proceedings in the order in which they occurred.

On April 11, 1921, the T. A. Scott Co. filed a libel in the district court against the steamship *Sao Vicente* and Transportes Maritimos Do Estado for salvage services. Whatever may be the character of this body, there can be no doubt of the libellant's right to institute suit or of the jurisdiction of the district court initially to entertain suit against it. Nor did the Transportes Maritimos Do Estado question either this right of the libellant or the jurisdiction of the court just then, but appeared by its proctors and filed a claim of ownership in the usual form, concluding with a prayer for leave to defend the action (281 Fed. 112).

There was nothing said or done to indicate either the fact or purpose of a special appearance. Without doubt the claimant's appearance was general. Pursuant thereto, its proctors proceeded to a stipulation for costs, and to a stipulation for value in the usual form (281 Fed. 113), upon condition to "abide by all orders of the court, interlocutory and final, and to pay the amount awarded." Whereupon the ship was released from custody and she sailed away.

Claim of immunity.

On June 2, 1921, the claimant changed its proctors. On the same day its new proctor filed its answer, traversing none of the averments of the libel, but raising for the first time the defense that the ship is a Portuguese vessel owned and operated by the Transportes Maritimos Do Estrada, which is a department of the Republic of

Portugal; that it objects to and protests against the assumption of jurisdiction by the District Court in a suit to which the sovereign foreign government has not consented, maintaining that the settlement of the matter in dispute "should be left to the Portuguese consul at the port of New York." 281 Fed. 113.

The answer was verified by Prista, vice consul general for the Republic of Portugal at New York.

[1] Exceptions by the libellant to the claimant's answer were sustained by the District Court on the ground that the claimant had entered a general appearance, and, having submitted itself to the jurisdiction of the court, it thereby had waived any right to appear specially at that late day for the purpose of attacking its jurisdiction.

We think the court was right on two grounds: First, because a sovereign may waive its immunity, and it is considered to have done so when it has entered litigation with a general appearance and when, as here, it has acted for a time and in a manner entirely consistent with such an appearance. *Beers* v. *Arkansas*, 20 How. 527; *Clark* v. *Barnard*, 108 U. S. 436, 447; *Richardson* v. *Fajardo Sugar Co.*, 241 U. S. 44; *Porto Rico* v. *Rosaly*, 227 U. S. 270; *Porto Rico* v. *Ramos*, 232 U. S. 627; *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, 284; *The Sao Vicente* (C. C. A.), 281 Fed. 111. We know of no more orderly way for a foreign government to consent to suit and submit to jurisdiction than by the voluntary act of entering a general appearance, and when this is followed by conduct permissible only under an appearance of that character, the sovereign must be held to have waived its immunity to suit. It will not suffice for it to change its attitude after the litigation is under way, for, as Mr. Justice McKenna, in the Ramos case, *supra*, said:

"The immunity of sovereignty from suit without its consent can not be carried so far as to permit it to reverse the action invoked by it and to come in and go out of court at its will, the other party having no right of resistance to either step."

[2] Second, we think the trial court was right in sustaining the exceptions to the claimant's answer for the added reason that the suggestion of immunity of the sovereign—itself insufficient in substance—was not made

through the proper official channels. It was made in the claimant's answer signed by its proctor and verified by the Portuguese vice consul general at the port of New York. That the public status of a ship can not be determined upon the mere suggestion of private counsel was decided in *ex parte Muir*, 254 U. S. 522, and that the consul general of the Republic of Portugal is not competent, merely by virtue of his office, to appear in court and claim immunity for his Government was decided in *The Sao Vicente*, 260 U. S. 151, on certiorari to the Circuit Court of Appeals for the Second Circuit, it being the case to which we have made frequent reference (281 Fed. 111). Lacking competency by virtue of his office to speak for his Government, there is nothing in the record which shows that the vice consul general was specially authorized by his Government to interpose a claim to immunity on its behalf. Therefore, on the record as it stood after the court had, without error, sustained exceptions to the claimant's answer by striking out the abortive suggestion of immunity of a sovereign, the claimant remained on the record in the situation in which it had placed itself by its general appearance. Thereupon the court entered an interlocutory decree and made an order referring the amount of salvage to a special commissioner. Here another substitution of proctors occurred.

The claimant did not introduce before the commissioner any evidence in opposition to the libellant's claim for salvage services, but presented to him an information, suggestion and petition of the Republic of Portugal for immunity from suit. This, very naturally, the commissioner refused to accept. From this point the case differs from *The Sao Vicente* (C. C. A.) 281 Fed. 111.

On January 24, 1923, the commissioner made a report awarding the libellant $50,000. No exceptions having been filed, the court, on February 20, 1923, affirmed the report and entered a final decree.

[3] On March 2, 1923, the proctor for the claimant left in the office of the clerk of the court an order for the allowance of an appeal and at the same time "left for filing in the office of the said clerk" the information and suggestion previously presented to the commissioner, signed and verified by his excellency, Jose d'Alte, envoy extraordinary and minister plenipotentiary of the Republic of Portugal, objecting to the exercise of jurisdic-

tion by the district court over the Transportes Maritimos Do Estado as an integral part of the sovereign Government of Portugal. As this information and suggestion had been signed and verified at Washington more than a month before the date of the final decree, and as it was brought to its attention for the first time 10 days after the date of the final decree, the District Court refused to regard it as having any bearing on the case. The claimant now maintains that the District Court erred in not opening the decree, accepting the suggestion, and yielding its jurisdiction. Without passing upon any question of error involved in the refusal of the court to open the decree and accept the suggestion, it is sufficient to say that, even if the court had done so, it would not have availed the claimant or the Republic of Portugal because the attempted suggestion was not conformable with the practice in such cases in that it was not presented through the proper official channels. (*Ex parte Muir*, 254 U. S. 522.)

The suggestion in the case at bar was presented by the Portuguese minister directly to the court. True, it was accompanied by a certificate of the Secretary of State to the effect that the minister whose name is subscribed thereto is duly accredited to this Government as envoy extraordinary and minister plenipotentiary of Portugal. As the Supreme Court said in *The Pesaro*, 255 U. S. 216, "while that established his diplomatic status it gave no sanction to the suggestion." This is particularly true in view of a footnote to the certificate of the Secretary of State that, "For the contents of the annexed document the department assumes no responsibility." In these circumstances "the libellants' objection that, to be entertained, the suggestion should come through official channels of the United States was well taken." *Ex parte Muir*, 254 U. S. 522; *United States* v. *Lee*, 106 U. S. 196, 209; *Societa Commerciale Italiana di Nav.* v. *Maru Nav. Co.* (D. C.), 271 Fed. 97; Id. (C. C. A.) 280 Fed. 334, 335.

On these authorities we are of opinion that the suggestion would have been without force had it been accepted by the court. The several acts of the Transportes Maritimos Do Estado, the Portuguese vice consul general at the port of New York, and the Portuguese minister at Washington, being both tardy and without legal sanction, left the claimant where it stood

on its general appearance and, therefore, left undisturbed the proceedings which went to final decree.

Decision. We find ourselves in full accord with the decision of the Circuit Court of Appeals for the Second Circuit in *The Sao Vicente*, 281 Fed. 111, in so far as that case resembles this one. Doubtless apprehending the force of that decision, based in part on *The Carlo Poma*, 255 U. S. 219, the appellee moved to dismiss the appeal.

The motion to dismiss the appeal is granted.

Buffington, circuit judge, took no part in this decision.

THE "GUL DJEMAL"

The docket title of this case is: *Steamship Gul Djemal, her engines, etc.; Hussein Lutfi Bey, master*, v. *Campbell & Stuart (Inc.)*.

(264 U. S. 90)

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 83. Argued January 4, 1924.—Decided February 18, 1924

The objection that a vessel, owned, possessed, manned, and operated by a foreign State, but engaged in ordinary commerce under charter to a private trader, is immune to libel in the District Court for services and supplies, can not be raised by her master, who, although a naval officer, is not functioning as such, and is not shown to have authority to represent his sovereign in making the objection.

296 Fed. 567, affirmed.

APPEAL from a decree of the District Court sustaining a libel against a ship, for services and supplies.

Mr. William A. Purrington and Mr. John M. Woolsey, with whom Mr. Frank J. McConnell was on the brief, for appellant.

Mr. Oscar R. Houston, with whom Mr. Ezra G. Benedict Fox was on the brief, for appellee.

Mr. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Statement of acts. Seeking to recover for supplies and services furnished at New York during November, 1920, in order to fit her for an intended voyage across the Atlantic, appellee libeled the steamship *Gul Djemal* and caused her arrest under the ordinary admiralty practice. Her master, appearing for the sole purpose of objecting to the court's jurisdiction, claimed immunity for the vessel because owned and possessed by the Turkish Government, and

asked that she be released. No one except the master has advanced this claim.

The parties stipulated:[1] The Turkish Government and the United States are at peace with each other, but diplo-

[1] "First. That at all the times mentioned in the libel herein, and at the time of the arrest of the *Gul Djemal*, the *Gul Djemal* was owned by the Turkish or Ottoman Government, that it flies the Turkish flag; that Turkey has but one flag, for both national and commercial uses; that it is registered in the name of Seire-Seffain administration; that the *Gul Djemal* is the absolute property of the Ottoman Seire-Seffain administration, the third division of the ministry of marine of the Turkish Government, which is attached to the ministry of war; that the maritime title has been given to the administration Seire-Seffain by the ministry of war. Said Seire-Seffain administration, at the times above mentioned, was (and is) the transport section of the ministry of marine, and was (and is) charged with the control of transport vessels of the Turkish Government, and said vessels (of which the *Gul Djemal* was one), which are capable of commercial uses, are, when not used as transports, used in commerce; whether such vessels are used as transports or in commerce is subject to the direction of the ministry of marine, which, through departments other than the Seire-Seffain, has charge of battleships, artillery, torpedoes, wireless, and engineering work pertaining to all the vessels of the Turkish Navy; that the *Gul Djemal* was transferred for operation to the administration Seire-Seffain from the ministry of war in 1914 and has since been under the control of administration of Seire-Seffain.

"Said Seire-Seffain administration, at the times above mentioned, had (and has), as its head, a military offier of the Turkisk Govenment, in the active or reserve service of the Turkish Government, and said head must be, at all times, a military officer in the employ of the Turkish Government, the Seire-Seffain administration being charged with the transport of troops, and at all the times above mentioned, said head of the Seire-Seffain administration was a colonel; although said head of the Seire-Seffain administration, at the times above mentioned, was, in respect of the *Gul Djemal*, not functioning in a military or naval capacity.

"Second. That at all the times mentioned in the libel herein, and at the time of the arrest of the *Gul Djemal*, the *Gul Djemal* was in the possession of the Turkish Government, being manned by a master, officers, and crew employed by or under the direction of said Seire-Seffain administration, and paid by the Treasury Department of the Turkish Government through the administration Seire-Seffain; said master, at the times above mentioned, was (and is) a reserve officer in the Turkish Navy employed by the branch of the ministry of marine known as the administration Seire-Seffain, and the navigating officer was a lieutenant in the active service of the Turkish Navy, both detailed by the said ministry of marine to serve on the *Gul Djemal* during the times above mentioned, but in such service they were not performing any naval or military functions, although they were subject to any orders from the department of the Turkish Government charged with naval or military affairs; the other officers and entire crew of the *Gul Djemal*, during the times above mentioned, were civilians, paid by the Turkish Government.

"Third. That at all the times mentioned in the libel herein, and at the time of the arrest of the *Gul Djemal*, the *Gul Djemal* was engaged in commercial trade, under charter for one round voyage to George Dedeoglou, who engaged to carry passengers and goods for hire, and in such trade the *Gul Djemal* was not functioning in a naval or military capacity, nor was there anything of a naval or military character connected with the voyage of the *Gul Djemal* from Constantinople to New York and return.

"Fourth. That the Turkish Government, prior to the time mentioned in the libel herein, had severed diplomatic relations with the United States of America, advising its peoples by proclamation, however, that American institutions should not be molested but should be treated as heretofore; that said diplomatic relations have not been resumed; although the United States of America maintains unofficial relations with the Turkish Government by American consular representatives, and through the medium of a high commissioner; that during said period of the severed relations, the Spanish ambassador to the United States has represented, and still represents, Turkish interests in the United States, and has been recognized as such representative by the Department of State of the United States of America.

"Fifth. That the Turkish or Ottoman Government, and the Government of the United States of America, are sovereign governments, and were at all the times mentioned herein, at peace with each other, although the Turkish or Ottoman Government was and is an ally of the enemy of the United States in the World War."

matic relations have been severed. The *Gul Djemal* is the absolute property of the Turkish Government and under the administration of the transport section of the ministry of marine. That government employed and paid the master, officers, and crew—the master being a reserve naval officer—and was in possession of the ship when arrested. She "was engaged in commercial trade, under charter for one round voyage to George Dedeoglou, who engaged to carry passengers and goods for hire, and in such trade the *Gul Djemal* was not functioning in a naval or military capacity, nor was there anything of a naval or military character connected with the voyage of the *Gul Djemal* from Constantinople to New York and return."

Claim of immunity.

The court below denied the alleged immunity and passed a decree for the libellant. Upon this direct appeal only the question of jurisdiction is presented. The relevant certificate follows:

"The sole question raised by the answer of the claimant herein, and the sole issue before this court, was the jurisdiction of the court over the steamship *Gul Djemal*, a vessel owned, manned, operated by and in the possession of the sovereign Government of Turkey, at peace with the Government of the United States of America. The allegations of the libellant that it had furnished supplies to the vessel, were admitted by the claimant, whose answer set up that the vessel was immune, as a sovereign-owned vessel, from the process of this court, and that the vessel was not within the admiralty and maritime jurisdiction of this court. I have granted a decree for the amount prayed for by the libellant, and have denied immunity to the vessel because at the time the cause of action and liability on which the libel is founded were created, and at the time the vessel was seized under process of this court, she was, although owned, manned by, and in the possession of the sovereign Government of Turkey, engaged in commercial trade, under charter for hire to a private trader; and furthermore, because diplomatic relations between the United States and Turkey were then severed and no appropriate suggestion was filed from the State Department of the United States."

Appellee maintains that whatever may be the proper rule in our courts concerning the ultimate immunity of vessels owned by foreign governments and employed in

ordinary trade and commerce, such immunity will not be granted upon the mere claim of the master, especially when the United States has no diplomatic relations with the sovereign owner. Such claim can be made only by one duly authorized to vindicate the owner's sovereignty. *Ex parte Muir*, 254 U. S. 522, 532, 533, is relied upon to support this view. It is there said—

"As of right the British Government was entitled to appear in the suit, to propound its claim to the vessel, and to raise the jurisdictional question. * * * Or, with its sanction, its accredited and recognized representative might have appeared and have taken the same steps in its interest. * * * And, if there was objection to appearing as a suitor in a foreign court, it was open to that Government to make the asserted public status and immunity of the vessel the subject of diplomatic representations to the end that, if that claim was recognized by the executive department of this Government, it might be set forth and supported in an appropriate suggestion to the court by the Attorney General, or some law officer acting under his direction."

Treating *Ex parte Muir* as relevant, appellant insists that within the meaning of the declaration there made the master of the *Gul Djemal*, a duly commissioned officer of the Turkish Navy, was the accredited and recognized representative of that Government, possessed of adequate authority to protest against the seizure and object to the court's jurisdiction.

Accredited representative.

We agree with the view advanced by the appellee. *The Anne*, 3 Wheat. 435, reaffirmed by *The Sao Vicente*, 260 U. S. 151, is enough to show that the immunity could not have been successfully set up by a duly recognized consul, representative of his sovereign in commercial matters, in the ordinary course of his official duties, and there seems no adequate reason to presume that the master of the *Gul Djemal* had any greater authority in respect thereto. Although an officer of the Turkish Navy, he was performing no naval or military duty, and was serving upon a vessel not functioning in naval or military capacity but engaged in commerce under charter to a private individual who undertook to carry passengers and goods for hire. He was not shown to have any authority to represent his sovereign other

Decision.

than can be inferred from his position as master and the circumstances specified in the stipulation of facts.

Affirmed.

Mr. Justice Holmes concurs in the result.

THE "WESTERN MAID"

(257 U. S. 419)

Ex parte in the matter of the United States, owner of the American steamship *Western Maid*, petitioner

Ex parte in the matter of the United States, former requisitioned or chartered owner of the auxiliary schooner *Liberty*, petitioner

Ex parte in the matter of the United States, former requisitioned and chartered owner of the American steamship *Carolinian*, petitioner

PETITIONS FOR WRITS OF PROHIBITION AND/OR MANDAMUS

Decided January 3, 1922

1. Neither upon general principle nor under section 9 of the shipping act of September 7, 1916, or section 4 of the "Suits in Admiralty" act of March 9, 1920,[2] is the United States liable for a collision committed by a vessel while owned by it absolutely or *pro hac vice* and employed by it in public and government purposes.
2. *Held*, that a vessel owned by the United States, assigned by the United States Shipping Board to the War Department, manned by a navy crew and engaged in transporting foodstuffs provided by the Government for the relief of the civilian population of Europe after the Great War, to be paid for by the buyer, was not a merchant vessel but a

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[2] Pertinent parts of the statutes above mentioned are as follows:

C. 451, sec. 9, 39 Stat. 730: "That any vessel purchased, chartered, or leased from the [United States Shipping] board may be registered or enrolled and licensed, or both registered and enrolled and licensed, as a vessel of the United States and entitled to the benefits and privileges appertaining thereto. * * *

"Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein. No such vessel, without the approval of the board, shall be transferred to a foreign registry or flag, or sold; nor, except under regulations prescribed by the board, be chartered or leased. * * *"

C. 95, sec. 4, 41 Stat. 525, 526: "That if a privately owned vessel not in the possession of the United States or of such [United States Shipping Board Emergency Fleet] corporation is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree obtained by the libelant in such cause, and thereafter such cause shall proceed against the United States in accordance with the provisions of this act."

vessel engaged in a public service; and that two others, while let or chartered to the United States on a bare-boat basis and devoted to military and naval uses were also of public status.

3. The maritime law is part of the law of the country only in so far as the United States has made it so, and binds the United States only in so far as the United States has consented.
4. The United States has not consented to be sued for torts and therefore it can not be said that, in a legal sense, the United States has been guilty of a tort.
5. This immunity extends to public vessels of the United States, at least while employed in operations of Government; and liability for a tort cannot be fastened upon them by the fiction of a ship's personality, to lie dormant while they remain with the Government and to become enforceable when they pass into other hands. *The Siren*, 7 Wall. 152, and *Workman* v. *New York City*, 179 U. S. 552, distinguished.
6. Prohibition lies to restrain the District Court from exceeding its jurisdiction in admiralty cases.

Rule absolute for writs of prohibition.

Petitions by the United States for writs of prohibition and mandamus to prevent District Courts from exercising jurisdiction in three proceedings *in rem* for collisions that occurred while the vessels libeled were owned absolutely or *pro hac vice* by the United States and employed in the public service.

Argument for the United States.

Mr. Solicitor General Beck, with whom Mr. Assistant Attorney General Ottinger and Mr. J. Frank Staley, special assistant to the Attorney General, were on the brief, for the United States.

The vessels were all of distinctively public status when the collisions occurred.

Section 9 of the shipping act has not waived the immunity of the United States or its vessels from suits *in rem* for losses arising while they are employed in the war service. Both the collision loss and the enforcement of the claim against the vessel must occur while the Government vessel is employed solely as a merchant vessel, and then is operating for the account of others than the Government, under charter or lease.

The filing of suggestions under section 4 of the suits in admiralty act only determines the United States as claimant for the vessel and substitutes its credit for the payment of the decree finally entered, if any, instead of the usual bond or stipulation for value otherwise entered to secure the release of a vessel from attachment. The proceedings continue as proceedings *in rem*. Manifestly,

if the libel does not state a cause of action, *in rem* against the vessel, this section can not create one.

Unless there is some magic in such public vessels' personification, the Government can not be held for these torts. There is no distinction between the Government and its property. There should be no relief by indirection where Congress has not provided relief directly. *Bigby* v. *United States*, 188 U. S. 400, 408; *Langford* v. *United States*, 101 U. S. 341, 344; *Gibbons* v. *United States*, 8 Wall. 269, 274. Public vessels are part of the sovereign State and their liabilities are merged in those of the sovereign. *United States* v. *Ansonia Brass Co.*, 218 U. S. 452; *Board of Commissioners* v. *O'Connor*, 86 Ind. 531, 537; *Rowley* v. *Conklin*, 89 Minn. 172; *The Fidelity*, 16 Blatchf. 569, 572, 573; *The Parlement Belge*, 4 Asp. M. C. 234, 237, 241; *The Prins Frederik*, 2 Dods. 451.

The law merchant personified the commercial ship not a public ship. Commercial vessels are sent in trade to all ports. Their owners are usually inaccessible for purposes of suit, and their personal responsibilities are uncertain. The necessities of the vessel's operation in merchant service demand that the vessel, the *res*, shall be responsible for her torts and contracts. The basis of the law governing merchant vessels is aid of commerce. *Vandewater* v. *Mills*, 19 How. 82; *United States* v. *Brig Malek Adhel*, 2 How. 210; *The China*, 7 Wall. 53; *The Eugene F. Moran*, 212 U. S. 466; *The Young Mechanic*, 2 Curtis 404; Holmes, The Common Law, page 25; Mayer's Admiralty Law and Practice, page 8. The reason and the origin of the rule show that it can not apply to public ships engaged in war service. Cf. *Ex parte New York, No. 1*, 256 U. S. 490.

Sovereign immunity includes immunity from lien liability as well as from process. *Ex parte Muir*, 254 U. S. 522; *Ex parte Hussein Lutfi Bey*, 256 U. S. 616; *Ex parte New York, No. 1*, 256 U. S. 490; *Ex parte New York, No. 2*, 256 U. S. 503; *The Davis*, 10 Wall. 15; *The Tampico*, 16 Fed. 491; *Johnson Lighterage Co.*, 231 Fed. 365; *The Rock Island Bridge*, 6 Wall. 213; *Kawananakoa* v. *Polyblank*, 205 U. S. 349; *Riddoch* v. *State*, 68 Wash. 329; 32 Harv. Law Rev. 447; 30 Harv. Law Rev. 20. *The Siren*, 7 Wall. 152, and *Workman* v. *New York City*, 179 U. S. 552, distinguished. Cf. *Carr* v. *United States*, 98 U. S. 433, 439.

Claim for owners.

Mr. T. Catesby Jones, with whom *Mr. James W. Ryan* was on the brief, for respondent in No. 21, Original.

The *Western Maid* was a merchant vessel at the time of the collision. The sale of foodstuffs to enemy aliens is not a necessary function of the sovereign. Indeed, the act of February 25, 1919, 40 Stat. 1161, indicates the opinion of Congress that it was unwise for the Government to engage in trade with enemy populations. It is doubtful whether it is constitutional for the Government to engage in transporting foodstuffs to be offered for sale at destination. *United States* v. *Strang*, 254 U. S. 491; *United States Shipping Board* v. *Wood*, 274 Fed. 893.

The collision took place two months after the armistice. Under such circumstances, the vessel could in no event be called a vessel engaged in a military operation. The Government has the burden of proof to establish that she was a public vessel engaged in a military operation. *Ex parte Muir*, 254 U. S. 522; *In re Jupp*, 274 Fed. 494, 485.

Even if it were a fact that no freight was to be paid for the carriage, this circumstance would not affect the case. It was intended that her cargo was to be sold to the civilian population of Europe.

There is no suggestion that the vessel was commissioned. *The Exchange*, 7 Cr. 116. On the contrary, the record shows that she was registered as a merchant ship, and it is to be inferred that she was operating under this registry. (Rev. Stats. secs. 4170, 4171; Navigation Laws of the United States, 1919, p. 41.)

Congress, by the suits in admiralty act of 1920, has waived immunity as to merchant vessels. In effect this is a suit under that act.

If we assume that the *Western Maid* was a public vessel at the time of the collision, nethertheless a claim in favor of the libelant was created against her at that time, which could be enforced *in rem*. *The Siren*, 7 Wall. 152, 13 Wall. 389. The Government contends that the language in 7 Wall. 155, 156, 158, is a dictum. When the members of this court, in face of a single dissent, make a doctrine one of the principal grounds for the court's decision, such a doctrine can hardly be called a dictum. The Government suggests that, because the *Siren* was a prize, the case is distinguishable. This conclusion does not follow. See Lord, Admiralty Claims, 19 Col. Law Rev. 477.

As we view the case, *The Siren* was a decision directly in point. The proposition relied upon by Mr. Justice Nelson as a ground for his dissent (7 Wall. 165), viz, that, if an owner of an offending vessel is not liable, it follows that there can be no lien, is contrary to the decisions in *The China*, 7 Wall. 53; *Ralli* v. *Troop*, 157 U. S. 386; *The Blackheath*, 195 U. S. 361; *Tucker* v. *Alexandroff*, 183 U. S. 424; *The Palmyra*, 12 Wheat. 1; *Brig. Malek Adhel*, 2 How. 210; *The John G. Stevens*, 170 U. S. 122; and *The Barnstable*, 181 U. S. 464, 467.

Liability *in rem* is entirely independent of liability *in personam*. *Homer Ramsdell Co.* v. *La Compagnie Généralé Transatlantique*, 182 U. S. 406.

Because of the difference between the American and English conceptions of the liability of a ship, the English authorities are not in point. *The Davis*, 10 Wall. 15; *The Carlo Poma*, 259 Fed. 369. But even in England it is settled, as was said in *Workman* v. *New York City*, 179 U. S. 552, that a collision impresses a liability on a public vessel which becomes enforcible when the crown waives the immunity of the public vessel. *The Ticonderoga*, 1 Swab. Adm. Rep. 215; *Fletcher* v. *Braddick*, 2 Bos. & P. 182.

In *Ex parte New York, No. 1*, 256 U. S. 490, this court said that the *Workman Case* dealt with a question of the substantive law of admiralty, not the power to exercise jurisdiction over the person of the defendant.

The doctrine of *The Davis* and *The Siren* has long been familiar to the Federal courts. *The Tampico*, 16 Fed. 491; *Thompson Navigation Co.* v. *Chicago*, 79 Fed. 984; *Johnson Lighterage Co.*, 231 Fed. 365; *The Attualita*, 238 Fed. 909; *The Luigi*, 230 Fed. 493; *The Othello*, 5 Blatchf. 343.

The Fidelity, 16 Blatchf. 569, was disapproved in *Thompson Navigation Co.* v. *Chicago*, 79 Fed. 984, and, so far as its dictum indicated a departure from the doctrine of *The Siren* and *The Davis*, was expressly disapproved in *Workman* v. *New York City*, 179 U. S. 552, and in *The Ceylon Maru*, 266 Fed. 396. See also *The U. S. S. Hisko, U. S. S. Roanoke and U. S. S. Pocahontas*, S. D. N. Y., March 17, 1921, Manton, J., (unreported); *The U. S. S. Newark*, S. D. N. Y., March 18, 1921, Knox, J., (unreported); *The U. S. S. Sixaola*, S. D. N. Y., April 21, 1921, Mayer, J., (unreported); *The F. J. Luckenbach*, 267 Fed. 931; *The Liberty* (unreported); now before this

court; *The Carolinian*, 270 Fed. 1011. And see *The Florence H*, 248 Fed. 1012; *The Gloria*, 267 Fed. 929; *The City of Philadelphia*, 263 Fed. 234; *United States* v. *Wilder*, 3 Sumner, 308, 312.

The principle that the maritime law extends to public vessels has been recognized by Congress, Act of August 19, 1890, c. 802, 26 Stat. 320; Rev. Stats., sec. 4233; *The Esparta*, 160 Fed. 269; *The A. A. Raven*, 231 Fed. 380. Cf. *Admiralty* v. *S. S. Eleanor*, VI Lloyd's List Law Rep. 456.

It can not be said that the liability arises from the act of the Government in waiving its immunity from suit. It existed before this suit; otherwise there could be no cause of action on which to base the suit. *United States* v. *Ringgold*, 8 Pet. 162; *United States* v. *Lee*, 106 U. S. 196, 206; Lord, Admiralty Claims, 19 Col. Law Rev. 477; Hearings, Senate Committee on Commerce, 66th Cong., 1st sess., on S. 2253, p. 18.

Kawananakoa v. *Polyblank*, 205 U. S. 349, 353, was not a suit in admiralty and the facts were wholly different from those in this case. It was not there intended to modify the doctrine of *The Siren*, *The Davis*, and of the *Ringgold Case*, *supra*.

Mr. Edward E. Blodgett, with whom Mr. Foye M. Murphy was on the brief, for respondent in No. 22, Original.

The burden of proving immunity from the lien is upon the petitioner. *The Tampico*, 16 Fed. 491.

The Liberty was subject to a maritime lien arising out of this collision. *The Bold Buccleugh*, 7 Moore P. C. 267; *The China*, 7 Wall. 53; *Ralli* v. *Troop*, 157 U. S. 386; *Briggs* v. *Light Boat*, 7 Allen, 287; *The John G. Stevens*, 170 U. S. 113; Holmes, The Common Law, pp. 26–34; *The Little Charles*, 1 Brock. 347; *The Palmyra*, 12 Wheat. 1; *United States* v. *Brig Malek Adhel*, 2 How. 210; *The John Fraser*, 21 How. 184; *The Merrimac*, 14 Wall. 199; *The Clarita*, 23 Wall. 1; *The Barnstable*, 181 U. S. 464; *The Luigi*, 230 Fed. 493; *Johnson Lighterage Co.*, 231 Fed. 365.

The lien arises though the vessel be owned, manned, and operated by a sovereign for war purposes. *United States* v. *Wilder*, 3 Sumner, 308; *The Davis*, 10 Wall. 15; *The Siren*, 7 Wall. 152; *Workman* v. *New York City*, 179 U. S. 552; *The Florence H*, 248 Fed. 1012; *The Gloria*,

267 Fed. 929; *The F. J. Luckenbach*, 267 Fed. 931; *The City of Philadelphia*, 263 Fed. 234.

The property of a sovereign is not immune from pre-existing maritime liens. *Briggs* v. *Light Boat, supra; United States* v. *Wilder, supra; The St. Jago de Cuba*, 9 Wheat. 416; *The Copenhagen*, 1 C. Rob. Adm. 289.

The petitioner by the act of March 9, 1920, has impliedly admitted that a lien may be created upon vessels owned or operated by it.

In England, technical immunity attaches to all property owned by the crown, irrespective of whether or not it is in possession of the sovereign. *The Broadmayne*, L. R. [1916] P. D. 64; *The Scotia*, [1903] A. C. 501. But the lords commissioners of the admiralty represent the crown, and have a discretionary power, freely exercised, to waive the privileges of the crown and consent to jurisdiction. *The Fidelity*, 16 Blatchf. 569; *United States* v. *New York & Oriental S. S. Co.*, 216 Fed. 61; *Thompson Navigation Co.* v. *Chicago*, 79 Fed. 984; *United States* v. *Lee*, 106 U. S. 196, 208; *Homer Ramsdell Co.* v. *La Compagnie Genéralé Transatlantique*, 182 U. S. 406. Furthermore, the personification of the *res* is not carried so far in England as in the United States. In the former the procedure *in rem* is used merely as a means to compel the appearance of the respondent, and judgment runs against the individual—the seizure of the *res* is incidental. *The Parlement Belge*, 5 P. D. 197.

Mr. Charles S. Haight, with whom Mr. Wharton Poor was on the brief, for respondent in No. 23, Original.

The case of the *Carolinian* is materially different from that of the *Western Maid* and other cases, where at the time of the collision title to the ship was in the Government.

The officers in command of the *Carolinian* when this collision occurred, while imposed upon the ship by the authority of the Government under the act of June 15, 1917, occupied no different position from the compulsory pilot imposed upon the *China*. (7 Wall. 53.) *The John G. Stevens*, 170 U. S. 113; *Tucker* v. *Alexandroff*, 183 U. S. 424; *Workman* v. *New York City*, 179 U. S. 552.

The decisions show that in order to sustain a suit *in rem* for collision only two conditions need exist: (1) Fault on the part of the navigators, and (2) the ability of the court to execute its process by seizure.

The attributes of sovereignty do not inure to the benefit of private individuals. *Moran* v. *Horsky,* 178 U. S. 205.

That a national war vessel may be held in fault for a collision due to the negligence of her officers and crew was directly decided in *The Sapphire,* 11 Wall. 164.

Even if, at the time of the collision, the *Carolinian* had been owned by the United States, an inchoate lien would nevertheless have been created which could be enforced in the present suit. *The Florence H,* 248 Fed. 1012; *The F. J. Luckenbach,* 267 Fed. 931; *The Gloria,* 267 Fed. 929; *The Ceylon Maru,* 266 Fed. 396; *Johnson Lighterage Co.,* 231 Fed. 365; *The Tampico,* 16 Fed. 491; *United States* v. *Wilder,* 3 Sumner, 308; *The City of Philadelphia,* 263 Fed. 234; *The Siren,* 7 Wall. 152; *The Davis,* 10 Wall. 15; *Workman* v. *New York City,* 179 U. S. 552.

The only basis on which the exemption of Government property from such a lien can be rested is the mediæval doctrine of "prerogative," which forms no part of our jurisprudence. *Dollar Savings Bank* v. *United States,* 19 Wall. 227; *United States* v. *Wilder, supra.*

Nor is there any principle of public policy which prevents the creation of a maritime lien against a public vessel owned by the United States. When the privately owned vessel is at fault, the United States collects its damages from the ship or her owners, and it is only fair that a private owner should have a like right when the Government ship is to blame. Congress has recognized this principle of equality by making the statutory rules for preventing collisions at sea binding upon public ships as well as private, 26 Stat. 320; 28 Stat. 645; 2 Fed. Stat. Ann., 2d ed., 376, 402, 449. If a merchant ship and a war ship are equally at fault, the damages are divided. *The Sapphire, supra.*

The justice of paying claims arising out of collisions for which public vessels were at fault has always been recognized by Congress through many special acts allowing claims.

The doctrine of the immunity of the sovereign from suit—to which so many exceptions have been made by statute as almost do away with the rule—is based not upon principle but upon precedent. *United States* v. *Lee,* 106 U. S. 196, 206; *United States* v. *Emery Bird Thayer Realty Co.,* 237 U. S. 28, 32. This is evidenced

by the practical relief from it in collision cases afforded in England, France, Germany, and in the State of New York.

The act of March 9, 1920, is an express recognition by Congress that a maritime lien may exist against a public vessel even though used solely for governmental purposes, and as the United States has secured the release of the *Carolinian* under this act it can not now contend that the court is without jurisdiction.

Opinion of court.

Mr. Justice HOLMES delivered the opinion of the court.

These are petitions for prohibition to prevent district courts of the United States from exercising jurisdiction of proceedings *in rem* for collisions that occurred while the vessels libeled were owned, absolutely or *pro hac vice*, by the United States, and employed in the public service. The questions arising in the three cases are so nearly the same that they can be dealt with together.

Statement of fact.

The *Western Maid* was and is the property of the United States. On January 10, 1919, she was allocated by the United States Shipping Board to the War Department for service as a transport. She had been loaded with foodstuffs for the relief of the civilian population of Europe, to be delivered on arrival at Falmouth, England, to the order of the Food Administration Grain Corporation, the consignor, American Embassy, London, care of the chief quartermaster, American Expeditionary Forces, France; subject to the direction of Mr. Hoover. If it should prove impracticable to reship or redirect to the territories lately held by the Central Empires, Mr. Hoover was to resell to the Allied Governments or to the Belgian Relief; the foodstuffs to be paid for by the buyer. The vessel was manned by a Navy crew. Later on the same day, January 10, 1919, in the New York Harbor, the collision occurred. On March 20, 1919, the vessel was delivered to the United States Shipping Board. The libel was filed on November 8, 1919. Act of September 7, 1916, c. 451, sec. 9, 39 Stat. 728, 730. *The Lake Monroe*, 250 U. S. 246. On February 20, 1920, the Government moved that it be dismissed for want of jurisdiction. The district court overruled the motion. On April 11, 1921, the Attorney General moved for leave to file the present petition in this court. Leave was granted and the case has been heard.

The *Liberty* was a pilot boat let to the United States on the bare-boat basis at a nominal rate of hire. She had been manned by a crew from the United States Navy and commissioned as a naval dispatch boat, and was employed to serve military needs in war service. The collision took place on December 24, 1917, while she was so employed, in Boston Harbor. Afterwards the vessel was redelivered to the owners, and still later, on February 5, 1921, the suit now in question was brought against her. On February 14, under the act of March 9, 1920 (c. 95, sec. 4, 41 Stat. 525), the United States filed a suggestion of its interest, and also set up the above facts. The district court held that they constituted no defense, and this petition was brought by the Attorney General along with that last mentioned.

The steamship *Carolinian* had been chartered to the United States upon a bare-boat charter and had been assigned to the War Department, by which she was employed as an Army transport and furnished with an Army crew. While she was so employed the collision took place in the harbor of Brest, France, on February 15, 1918. Afterwards the *Carolinian* was returned to the owners and she was employed solely as a merchant vessel on July 9, 1920, when the suit in question was begun, under which the vessel was seized. In the same month the United States filed a suggestion of interest and on January 6, 1921, set up the foregoing facts and prayed that the libel be dismissed. The District Court maintained its jurisdiction and this petition was brought by the Attorney General along with the other two. (270 Fed. 1011.)

Liability of the United States.

It may be assumed that each of these vessels might have been libeled for maritime torts committed after the redelivery that we have mentioned. But the act of September 7, 1916 (c. 451, sec. 9), does not create a liability on the part of the United States, retrospectively, where one did not exist before. Neither, in our opinion, is such a liability created by the act of March 9, 1920 (c. 95, sec. 4), authorizing the United States to assume the defense in suits like these. It is not required to abandon any defense that otherwise would be good. It appears to us plain that before the passage of these acts neither the United States nor the vessels in the hands of the United States were liable to be sued for these alleged maritime torts. The *Liberty* and the *Carolinian* were

employed for public and Government purposes and were owned *pro hac vice* by the United States. It is suggested that the *Western Maid* was a merchant vessel at the time of the collision, but the fact that the food was to be paid for and the other details adverted to in argument can not disguise the obvious truth that she was engaged in a public service that was one of the constituents of our activity in the war and its sequel and that had no more to do with ordinary merchandizing than if she had carried a regiment of troops. The only question really open to debate is whether a liability attached to the ships which, although dormant while the United States was in possession, became enforcible as soon as the vessels came into hands that could be sued.

Maritime law. In deciding this question we must realize that however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic overlaw to which even the United States must bow. When a case is said to be governed by foreign law or by general maritime law, that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules. *The Lottawanna*, 21 Wall. 558, 571, 572. *Dalrymple* v. *Dalrymple*, 2 Hagg. Cons. 54, 58, 59. Dicey, Conflict of Laws, 2d ed., 6, 7. Also we must realize that the authority that makes the law is itself superior to it, and that if it consents to apply to itself the rules that it applies to others the consent is free and may be withheld. The sovereign does not create justice in an ethical sense, to be sure, and there may be cases in which it would not dare to deny that justice for fear of war or revolution. Sovereignty is *a* question of power, and no human power is unlimited. *Cariño* v. *Insular Government of the Philippine Islands*, 212 U. S. 449, 458. But from the necessary point of view of the sovereign and its organs whatever is enforced by it as law is enforced as the expression of its will. *Kawananakoa* v. *Polyblank*, 205 U. S. 349, 353.

The United States has not consented to be used for torts, and therefore it can not be said that in a legal sense the United States has been guilty of a tort. For a tort is a tort in a legal sense only because the law has made it so. If then we imagine the sovereign power announcing the

system of its laws in a single voice it is hard to conceive it as declaring that while it does not recognize the possibility of its acts being a legal wrong and while its immunity from such an imputation of course extends to its property, at least when employed in carrying on the operations of the Government—specifically appropriated to national objects, in the language of *Buchanan* v. *Alexander*, 4 How. 20—yet if that property passes into other hands, perhaps of an innocent purchaser, it may be seized upon a claim that had no existence before. It may be said that the persons who actually did the act complained of may or might be sued and that the ship for this purpose is regarded as a person. But that is a fiction, not a fact, and as a fiction is the creation of the law. It would be a strange thing if the law created a fiction to accomplish the result supposed. It is totally immaterial that in dealing with private wrongs, the fiction, however originated, is in force. See *Liverpool, Brazil & River Plate Steam Navigation Co.* v. *Brooklyn Eastern District Terminal*, 251 U. S. 48, 53. The personality of a public vessel is merged in that of the sovereign. *The Fidelity*, 16 Blatchf, 569, 573. *Ex parte State of New York, No. 2*, 256 U. S. 503.

But it is said that the decisions have recognized that an obligation is created in the case before us. Legal obligations that exist but can not be enforced are ghosts that are seen in the law but that are elusive to the grasp. The leading authority relied upon is *The Siren*, 7 Wall. 152. The ground of that decision was that when the United States came into court to enforce a claim it would be assumed to submit to just claims of third persons in respect of the same subject-matter. 7 Wall. 154. *Carr* v. *United States*, 98 U. S. 433, 438. In reaching its result the court spoke of such claims as unenforcible liens, but that was little more than a mode of expressing the consent of the sovereign power to see full justice done in such circumstances. It would have been just as effective and more accurate to speak of the claims as ethical only, but recognized in the interest of justice when the sovereign came into court. They were treated in this way by Dr. Lushington in *The Athol*, 1 Wm. Rob. 374, 382. Further distinctions have been taken that need not be adverted to here. There was nothing decided in *Workman* v. *New York City*, 179 U. S. 552, that is contrary to our conclusion, which, on the other hand, is favored by *The Fidelity*,

16 Blatchf. 569, 573, and *Ex parte State of New York, No. 1*, 256 U. S. 490, and *Ex parte State of New York, No. 2*, 256 U. S. 503. The last cited decisions also show that a prohibition may be granted in a case like this. See *The Ira M. Hedges*, 218 U. S. 264, 270.

Rule absolute for writs of prohibition.

Mr. Justice McReynolds did not hear the argument in this case and took no part in the decision.

Dissenting opinions.

Mr. Justice McKenna, with whom concurred Mr. Justice Day and Mr. Justice Clarke, dissenting.

The question in the cases is without complexity, and the means of its solution ready at hand. The question is, What is the law applicable to colliding vessels and what remedy is to be applied to the offending one, if there be an offending one? The question, I venture to say, has unequivocal answer in a number of decisions of this court if they be taken at their word. And why should they not be? That they have masqueraded in a double sense, can not be assumed; that they have successively justified implications adverse to their meaning would be a matter of wonder.

What then do they express to be the law of colliding vessels, the assignment of offence, if offence there be, and how far is it dependent, if at all, upon whether the offender was in public or private service?

Admiralty jurisdiction

The answer may be immediate. This court has kept steadily in mind that the admiralty jurisprudence of the country, as adopted by the Constitution, has a distinctive individuality, and this court has felt the necessity of keeping its principles in definite integrity, and the r medies intact by which its principles can alone be realized. The most prominent and efficient of its remedies is that which subjects its instrumentalities, its ships particularly, to judgment. Personality is assigned to them and they are considered to pledge to indemnify any damage inflicted through them. They are made offenders and have the responsibility of offenders, and the remedy is suited to the purpose. In *Rounds* v. *Cloverport Foundry & Machine Co.*, 237 U. S. 303, 306, it is said, Mr. Justice Hughes delivering the opinion of the court, "The proceeding *in rem* which is within the exclusive jurisdiction of admiralty is one essentially against the vessel itself as the debtor or offending thing,—in which the vessel is itself 'seized and impleaded as the defendant, and is judged and sentenced accordingly.'"

In the *John G. Stevens*, 170 U. S. 113, 120, the court, through Mr. Justice Gray, declared, "The foundation of the rule that collision gives to the party injured a *jus in re* in the offending ship is the principle of the maritime law that the ship, by whomsoever owned, or navigated, is considered as herself the wrongdoer, liable for the tort, and subject to a maritime lien for the damages. This principle, as has been observed by careful text writers on both sides of the Atlantic, has been more clearly established and more fully carried out, in this country than in England. Henry on Admiralty, section 75, note; Marsden on Collisions (3d ed.) 93." The case in many ways and by many citations fortifies and illustrates the principle.[5]

The *Siren* was cited and the fact is pertinent as we shall presently see. The *China*, 7 Wall. 53, was also cited and quoted from. The quotation was repeated in *Ralli* v. *Troop*, 157 U. S. 386, 402, 403, where it is said that the liability of a vessel is not derived from the authority or agency of those on board, either under the civil or common law, "but upon a distinct principle of maritime law, namely, that the vessel, in whosesoever hands she lawfully is, is herself considered as the wrongdoer, liable for the tort, and subject to a maritime lien for the damages.

In *Tucker* v. *Alexandroff*, 183 U. S. 424, 438, this court by Mr. Justice Brown gave graphic representation to the same principle. He described a ship prior to her launching as "a mere congeries of wood and iron" but after launching she took on a name, a personality of her own and had in a sense volition, became competent to contract and be contracted with, sue and be sued, could have agents of her own, was capable of committing a tort and was pledged to its reparation. Cases were cited, the *Siren* among others.

The doctrine thus explicitly announced is denied application in the pending cases and upon what grounds? As I understand, the contention is that a vessel has not independent guilt, that there must be fault in its owner or operator, his fault becoming its fault. This has been said, but it puts out of view her character as bail and that the innocent victim of the injury she has inflicted shall not

[5] *General Mutual Insurance Co.* v. *Sherwood*, 14 How. 351, 363; *The Creole*, 2 Wall. Jr. 485, 518; *The Mayurka*, 2 Curtis, 72, 77; *The Young Mechanic*, 2 Curtis, 404; *The Kiersage*, 2 Curtis, 421; *The Yankee Blade*, 19 How. 82, 89; *The Rock Island Bridge*, 6 Wall. 213, 215; *The China*, 7 Wall. 53, 68; *The Siren*, 7 Wall. 152, 155; *The Lottawanna*, 21 Wall. 558, 579; *The J. E. Rumbell*, 148 U. S. 1, 10, 11, 20; *The Glide*, 167 U. S. 606.

be remitted to the insufficient or evasive responsibility of persons but shall have the security of the tangible and available value of the thing. And this responsibility and fullness of indemnity we have seen it was declared in the *John G. Stevens*, *supra*, distinguished the law of this country from that of England.

But if the contention were conceded it would not determine these cases. I reject absolutely that because the Government is exempt from suit it can not be accused of fault. Accountability for wrong is one thing, the wrong is another.

But I do not have to beat about in general reasoning. I may appeal to the authority of the *Siren*, 7 Wall. 152 and the cases that have approved and followed it. A gloss is attempted to be put upon it—which we think is unjustified and inaccurate unless, indeed, it can be asserted that the writer of the opinion did not know the meaning of the words he used, and, that the members of the court who concurred with him, were equally deficient in understanding. And their insensibility to what the words conveyed had no excuse. A dissenting justice tried to bring their comprehensive import to understanding, proclaimed indeed, that the words had the extent and consequence that the court now says were not intended or accomplished.

The *Siren*.

The *Siren*, while in charge of a prize master and crew, having been taken in prize by the United States, ran into in the port of New York and sank the sloop *Harper*. The collision was regarded by the court as the fault of the *Siren*. She was condemned as prize and sold and the proceeds deposited with the Assistant Treasurer of the United States. The owners of the *Harper* asserted a claim upon her and her proceeds for the damages sustained by the collision. The District Court rejected the claim. Its action was reversed by this court.

The United States was an actor in the case and this was regarded by the court, who spoke by Mr. Justice Field, as removing the impediment to the claim of the owners of the *Harper*. It was not, however, the basis of recovery. There was no confusion in the language or conception of the learned justice, nor in the court, of that. By becoming the actor, the United States, it was said, waived its exemption from direct suit and opened "to consideration all claims and equities in regard to the

property libelled"—not, of course, that the waiver of exemption created the "claims and equities." They, it was explicitly said, were created against the offending vessel by the collision. "In such case," the language was, "the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, can not be enforced by direct proceedings against the vessel." And again, "The inability to enforce the claim against the vessel is not inconsistent with its existence."

The distinction was clearly made between exemption of the United States, the offense of the vessel and the existence of a claim against it in consequence of its offense. And the distinction was emphasized in the dissent of Mr. Justice Nelson. He was at pains to distinguish between liability to suit and legal liability for the act of injury, the ground of suit. And the basis of his dissent was the same as the basis of the opinion of the court in the present cases, but not so epigrammatically expressed. In the opinion in these cases it is said that "the United States has not consented to be sued for torts, and therefore it can not be said that in a legal sense the United States has been guilty of a tort. For a tort is a tort in a legal sense only because the law has made it so."

Mr. Justice Nelson was more discursive. He said that "if the owner of the offending vessel [he regarded the *Siren* as owned by the United States] is not liable at all for the collision, it follows, as a necessary legal consequence, that there can be no lien, otherwise the nonliability would amount to nothing." And again, "if the Government is not responsible, upon the principles of the common law, for wrongs committed by her officers or agents, then, whether the proceedings in the admiralty are against the vessel, or its proceeds, the court is bound to dismiss them." And giving point to this view the learned justice observed that "no principle at common law is better settled than that the Government is not liable for the wrongful acts of her public agents."

I repeat, that in view of these extracts from Mr. Justice Nelson's dissent, misapprehension of its opinion by the court is not conceivable nor carelessness of utterance. Yet the opinion in the present cases practically so asserts and, in effect, regards Mr. Justice Nelson's dissent as the law of the *Siren* and not that which the court pronounced.

The court decided that the vessel was the offending thing, and though it could not be reached in the hands of the Government, this "inability to enforce the claim against the vessel" was "not inconsistent with its existence."

The inevitable deduction is that in such situation the enforcement of a claim is suspended only, and when the vessel passes from the hands of the Government, as the offending vessels have in the cases at bar, they and "all claims and equities in regard to" them may be enforced.

The case was commented on in The *Davis*, 10 Wall. 15, 20, and the gloss now put upon it rejected. It is there said that the well-supported doctrine of the case is "that proceedings *in rem* to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the court."

So again in *Workman* v. *New York City*, 179 U. S. 552, where it is said, Chief Justice White delivering the opinion of the court, after an exhaustive review of cases, such as he usually gave, "It results that, in the maritime law, the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, where the court has jurisdiction." In view of this it is difficult to understand how it can be said that there was nothing that case decided contrary to the conclusion in these cases.

Against this array of cases and their reasoning, *Ex parte State of New York, No. 2*, 256 U. S. 503, and *Ex parte State of New York, No. 1*, 256 U. S. 490, are adduced. Neither case has militating force. The latter case decided nothing but that a State can not be sued without its consent. An indisputable proposition which this court in its opinion had to clear from confusing or disturbing circumstances. In the former case, The *Queen City*, a steam tug, was in the possession and service of the State of New York and to have awarded process against it as the district court did, would have arrested the service. This court rightfully reversed that action. The tug had not been released from that immunity as the vessels were in the pending cases.

Counsel for claimants in opposition to the petition cite cases at circuit and district which followed *The Siren*.[4] It is not necessary to review or comment upon them. They are testimony of what the judiciary of the country considered and consider *The Siren* and other cases decided. Therefore we can not refrain from saying that it is strange, that notwithstanding the language of *The Siren*, its understanding and acceptance in many cases in this court, the enforcement of its doctrine at circuit and district, it should now be declared erroneous. The cases at bar would seem to be cases for the application of the maxim of *stare decisis* which ought to have force enough to resist a change based on finesse of reasoning or attracted by the possible accomplishment of a theoretical correctness.

The rules should be discharged.

THE "CHARLOTTE"

(299 F. 595)

CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

April 28, 1924

Before HOUGH, MANTON, and MAYER, Circuit Judges.

PER CURIAM: This is the same litigation which gave rise to the proceedings in *Ex parte New York No. 1*, 256 U. S. 491.

The *Charlotte*, owned by claimants herein, was by a document called a charter and lease, in the employment of the State of New York and used by the authority of that State in towing on the Erie Canal. Libelant asserts by this suit *in rem* that she was negligently navigated to the injury of his barge or canal boat. The question here is whether this action can be maintained under the author-

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[4] *The U. S. S. Hisko, U. S. S. Roanoke,* and *U. S. S. Pocahontas* (Circuit Judge Manton S. D. N. Y.) (March 17, 1921, unreported opinion annexed to brief);

The U. S. S. Newark (District Judge Knox, S. D. N. Y.) (March 18, 1921, unreported opinion annexed to brief);

The U. S. S. Sixaola (District Judge Mayer, S. D. N. Y.) (April 21, 1921, unreported opinion annexed to brief);

The F. J. Luckenbach, 267 Fed. 931; *The Liberty*, now before this court; *The Carolinian*, 270 Fed. 1011, also now before this court.

Also: *The Florence H.*, 248 Fed. 1012; *The Gloria*, 267 Fed. 929; *The City of Philadelphia*, 263 Fed. 234.

Counsel also cites: *The Tampico*, 16 Fed. 491; *Thompson Navigation Co.* v. *City of Chicago*, 79 Fed. 984; *Johnson Lighterage Co.*, 231 Fed. 365; *The Attualita*, 238 Fed. 909; *The Luigi*, 230 Fed. 493; *The Othello*, 5 Blatchf. 343.

ity of the case above cited, of *The Queen City* (*Ex parte New York No. 2*) 256 U. S. 503, and *The Western Maid*, 257 U. S. 419.

[1] Nothing need be added to the opinion of the court below in respect of its holding that the charter and lease of the *Charlotte* existing at the time of the alleged negligence was a demise of the vessel and made the State of New York her owner *pro hac vice*.

Immunity of State of New York.

The first case cited above shows that no action in *personam* would lie against the State of New York in the admiralty for the damage complained of; *The Queen City* shows that if the *Charlotte* had been owned absolutely by the State, no action *in rem* could have been maintained against the vessel; and the *Western Maid* shows that in respect of the sovereign United States there is no difference between a vessel owned outright and one owned *pro hac vice* by the sovereign.

[2] This reduces the question at bar to an inquiry whether there is any difference between the sovereignty of the United States and that of the State of New York in so far as its immunity from suits of this kind is concerned.

The general nature of a State's sovereignty has been too often set forth to require additional exposition now; it is summarily stated with due citation of authorities in 36 Cyc. 828.

It is thought that no State has been more insistent upon the extent of its sovereign powers than the State of New York, and that sovereignty has recently received full recognition in *Marshall* v. *People of the State of New York*, 254 U. S. 380, where all the New York cases are cited. We think it unnecessary to do more than state our acceptance of the proposition that in the absence of any diminution of power in this regard by the Constitution of the United States, the State of New York can neither be sued in *personam* for the tort complained of, nor can its property, whether absolute or owned *pro hac vice*, be made to respond for the same tort. In other words, the doctrine of *Western Maid*, *supra*, applies to and governs this case.

Decree affirmed, with costs.

THE "PORTO ALEXANDRE"

([1920], P. 30)

Admiralty—Public vessel—Immunity from process of arrest—Trading by public vessel

A vessel owned or requisitioned by a sovereign independent state and earning freight for the state, is not deprived of the privilege, decreed by international comity, of immunity from the process of arrest, by reason of the fact that she is being employed in ordinary trading voyages carrying cargoes for private individuals.

The Parlement Belge (1880) 5 P. D. 197 considered and applied.

Appeal from a decision of Hill J. setting aside the writ *in rem* and all subsequent proceedings against the steamship *Porto Alexandre*.

The *Porto Alexandre*, formerly the German-owned steamship *Ingbert*, a vessel of 2,699 tons gross, by a decree of the Portuguese prize court of January 30, 1917, was adjudged a lawful prize of war. She had previously been requisitioned by the Portuguese Government and handed over to the Commission of Services of Transports Maritims and was being employed in ordinary trading voyages earning freight for the Government.

In September, 1919, she loaded a cargo of cork shavings for carriage to Liverpool under a bill of lading from which it appeared that the cargo was shipped by and consigned to the Portuguese Import and Export Co., (Ltd.). On September 13, when in the Crosby Channel at the entrance to the Mersey, the vessel got aground and salvage services were rendered to her by three Liverpool tugs, the *Nora*, *Expert*, and *Torfreda*. On September 16 a writ *in rem* was issued on behalf of the owners, masters, and crews of these tugs in respect of the services against "the owners of the Portuguese steamship *Porto Alexandre*, her cargo and freight." On September 24 the solicitors for the defendants accepted service of the writ and undertook to appear on behalf of the cargo owners, and on September 25 entered appearance "under protest" for the owners and freight. On October 2 a motion was set down to set aside the writ and all subsequent proceedings on the ground that the *Porto Alexandre* and the freight "were and are the public national property of and/or requisitioned by and in the possession and public use and service of the Portuguese Government." The motion came before Hill, J., on October 20 and 27, 1919, and was supported by a communication from the

Portuguese chargé d'affaires to Lord Curzon, the Secretary of State for Foreign Affairs, who in turn communicated it to the learned judge, that the *Porto Alexandre* was "a state-owned vessel belonging to the Government of the Portuguese Republic."

Hill, J., in giving judgment said that he had arrived at his decision with the greatest reluctance. Upon the facts he was prepared to find, if it were necessary, that the *Porto Alexandre* was being used in ordinary commerce, and that the only interest of the Portuguese Government was in the earning of freight. But in his view the law as laid down in *The Parlement Belge* [5] was that a sovereign state could not be impleaded either by being served *in personam* or indirectly by proceedings against its property; and if that were the principle it mattered not how the property was being employed. His lordship continued: "I think, therefore, that this motion succeeds upon the ground that it is established that this ship was the property of the Portuguese Government at the time of arrest and is now its property. It therefore follows that so far as the ship and freight are concerned the writ and all subsequent proceedings must be set aside, but the writ and all subsequent proceedings so far as the cargo is concerned will remain good. I have already, in previous cases, pointed out what I conceive to be very strong reasons why it is undesirable that cases should be withdrawn, as this is being withdrawn, from the courts, but I have only to assert now what I conceive to be the law."

The plaintiffs appealed.

Argument for the appellants.

November 10. C. R. Dunlop, K. C., and J. B. Aspinall for the appellants. Although a sovereign ruler can not be impleaded even in respect of private transactions, international comity does not extend the same immunity to the property of states unless employed in the public service. The decision of the court of appeal in *The Parlement Belge* [5] no doubt qualifies to some extent the views of Sir Robert Phillimore as expressed in the court below in that case [6] and in *The Charkieh*.[7] But the court of appeal, in reversing Sir Robert Phillimore, took a different view of the facts, and the case is not an authority for the proposition that a foreign state-owned merchant ship

[5] 5 P. D. 197. [6] (1879) 4 P. D. 129. [7] (1873) L. R. 4 A. & E. 59, 74.

engaged on an ordinary mercantile voyage is immune from the process of arrest. The *Parlement Belge* was a mail boat, and although carrying passengers and cargo this was merely ancillary to her real employment, which was that of carrying the Belgian State mails. The correct view was that stated by Marshall, C. J., in an old American authority (*U. S. Bank* v. *Planters' Bank* [8]), that "when a Government becomes a partner in any trading company it devests itself, so far as concerns the transactions of that company, of its sovereign character." [*The Prins Frederik* [9] was also referred to.]

D. Stephens, K. C., and A. W. Grant for the respondents were not called on.

Bankes, L. J.: This is an appeal from a decision of Hill, J., who made an order that the writ and warrant for arrest, and all subsequent proceedings against the *Porto Alexandre* and freight, be set aside, but the proceedings against the cargo should stand. The learned judge was only concerned with the question of the ship, and this appeal has only reference to the ship.

The vessel in question was on a voyage from Lisbon to Liverpool, and she ran aground in the Mersey, and three tugs were engaged to get her off. An action was brought, and the ship was arrested in respect of the services rendered to her by these tugs. The application which the learned judge granted was founded upon the contention that the vessel was the property of a sovereign state, the Republic of Portugal, and on that ground, that she was exempt from arrest. The conclusion of fact at which the learned judge arrived was that it had been established that the ship was the property of the Portuguese Government at the time of the arrest, and is still their property, and on that ground he made the order.

It is now contended that it is not sufficient for a sovereign or a sovereign state to allege that a vessel is the property of such sovereign or sovereign state, and that the allegation must go further and say the vessel is employed in the public service or on public service.

Statement of facts.

The facts with regard to the vessel are as follows: She was originally a German merchant vessel, and in August, 1916, she was requisitioned by the Portuguese Government. On August 11 what is called a passport was issued, which authorized the employment of the vessel and contains

[8] (1824) 9 Wheat. 904, 907.

[9] (1820) 2 Dods. 451.

notes upon it, indicating that during the period that the vessel was at the service of the Portuguese Government, for which she was requisitioned, her port of register should be Lisbon. There is also an indorsement on the passport stating that on January 30, 1917, she was adjudged a lawful prize of war. Mr. Dunlop has pointed out that the statement that she was adjudged a lawful prize of war leaves it doubtful whether she has become the actual property of the Portuguese Government, or whether she was merely detained pending the conclusion of peace. It would rather appear that the latter is the proper conclusion, because there is an affidavit by the Portuguese vice consul at Liverpool, who says that the vessel is, and has been, requisitioned by the Portuguese Government for the service of the State, and is employed under the orders of the Government. There is a further statement in writing by the Portuguese consul at Liverpool, in which he says in reference to this particular voyage that the freight on the cargo was paid before shipment and belongs solely and entirely to the Portuguese Government. In addition to that, there is a letter from the Portuguese chargé d'affaires, in which he states definitely that the *Porto Alexandre* is a public service vessel belonging to the Portuguese Government.

There is no reason to doubt the accuracy of the statements that have been made on affidavit in this case—that the vessel has been requisitioned under the order of the Portuguese Government, and that on the particular voyage she was carrying freight for that Government. Mr. Dunlop, however, contends that is not sufficient, because it is shown she was engaged in what he says was an ordinary commercial undertaking, as an ordinary trading vessel carrying goods for a private individual or a private company. The question is, whether it is possible in the circumstances of this case to distinguish it from *The Parlement Belge*,[10] which was a decision of this court, and is binding upon us.

I gather from the judgment of Hill, J., and from what has been said by learned counsel, that this question is becoming one of growing importance. In the days when the early decisions were given, no doubt what were called Government vessels were confined almost entirely, if not exclusively, to vessels of war. But in modern times sovereigns and sovereign states have taken to

[10] 5 P. D. 197.

owning ships, which may to a still greater extent be employed as ordinary trading vessels engaged in ordinary trading. That fact of itself indicates the growing importance of the particular question, if vessels so employed are free from arrest.

The function of this court in this particular case is to decide whether it is covered by *The Parlement Belge*.[7] I think it is, and it is therefore not neccessary or desirable that the court should enter upon a discussion of the wider question at this stage, or consider the importance of other views that may be taken. There is very little difference between the material facts in *The Parlement Belge* and in the present case, and in my opinion *The Parlement Belge* is an authority which covers the present case. It is quite true that in many of the earlier cases the claim put forward, with regard to a particular ship, was that she was on public service and employed in the public service, and no doubt the statement so made was applicable to the particular case, and was made because it was applicable to the particular case, and the judgments were delivered in reference to the facts so stated. But in this case the court is bound by the decision in *The Parlement Belge* and the appeal must be dismissed with costs.

Warrington, L. J.: I am of the same opinion. I think the case is clearly covered by the decision in *The Parlement Belge* [11], and, that being so, we have no alternative but to dismiss the appeal.

In the present case, the facts proved appear to me to amount to this: It is first proved that the ship in question is a public vessel, the property of the Portuguese Government; next it is proved by the affidavits that it is in their possession for the service of the State; and, thirdly, it is proved that it is employed under the orders of the Government. There is one passage in the judgment of Brett, L. J., in *The Parlement Belge* in which he is expressing what he considers to be the result of the judgment in *Briggs* v. *Light Boats* [12], an American case, of which he obviously approves and on which he founds his own conclusion. He says: "The ground of that judgment is that the public property of a Government in use for public purposes is beyond the jurisdiction of the courts of either

[11] 5 P. D. 197, 213, 217. [12] (1865) 93 Mass. 157.

its own or any other state, and that ships of war are beyond such jurisdiction, not because thay are ships of war, but because they are public property. It puts all the public movable property of a state, which is in its possession for public purposes, in the same category of immunity from jurisdiction as the person of a sovereign, or of an ambassador, or of ships of war, and exempts it from the jurisdiction of all courts for the same reason, viz, that the exercise of such jurisdiction is inconsistent with the independence of the sovereign authority of the state." And then again, when he is summing up the principle which he thinks is to be deduced from all the cases, he says: "As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise, by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or"—and these are the material words—"over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction."

Whatever may be the actual use to which this ship is put, I think the evidence is quite sufficient to show that it is the property of the state, and is destined to public use; and, that being so, the case seems to me to come exactly within the principle of the judgment in *The Parlement Belge* [13], with the result which I indicated at the beginning of my judgment.

Scrutton, L. J.: In this case the *Porto Alexandre* came into the Mersey, got on to the mud, and was salved by three Liverpool tugs. On arresting her to obtain security for the payment of their salvage, the Portuguese Republic, through the Portuguese chargé d'affaires, put forward a statement that she was a public vessel of the Portuguese Republic, and was therefore exempt from any process in England. Accordingly the defendants moved to set aside the writ and arrest. Hill, J., in the admiralty court granted the application, and the plaintiffs' appeal to this court.

[13] 5 P. D. 197.

Now, this State and other States proceed in their jurisprudence on the assumption that sovereign States are equal and independent, and that as a matter of international courtesy no one sovereign independent State will exercise any jurisdiction over the person of the sovereign or the property of any other sovereign State; and now that sovereigns move about more freely than they used to, and do things which they used not to do, and now that States do things which they used not to do, the question arises whether there are any limits to the immunity which international courtesy gives as between sovereign independent States and their sovereigns. I think it has been well settled first of all as to the sovereign that there are no limits to the immunity which he enjoys. His private character is equally free as his public character. If he chooses to come into this country under an assumed name and indulge in privileges not peculiar to sovereigns, of making promises of marriage and breaking them, the English courts still say on his appearing in his true character of sovereign and claiming his immunity, that he is absolutely free from the jurisdiction of this court. That is the well-known case of *Mighell* v. *Sultan of Johore.*[14] It has been held, as Mr. Dunlop admits, in *The Parlement Belge*[15] that trading on the part of a sovereign does not subject him to any liability to the jurisdiction. His ambassador is in the same position; an ambassador, coming here as an ambassador of the sovereign may engage in private trading, but it has been held that his immunity still protects him even from proceedings in respect of his private trading. Jervis, C. J., in *Taylor* v. *Best,*[16] said: "* * * if the privilege does attach, it is not, in the case of an ambassador or public minister, forfeited by the party's engaging in trade, as it would, by virtue of the proviso in the 7 Anne, chapter 12, section 5, in the case of an ambassador's servant. If an ambassador or public minister, during his residence in this country, violates the character in which he is accredited to our court by engaging in commercial transactions that may raise a question between the government of this country and that of the country by which he is sent; but he does not thereby lose the general

Immunity.

[14] [1894] 1 Q. B. 149. [15] 5 P. D. 197. [16] (1854) 14 C. B. 487, 519.

privilege which the law of nations has conferred upon persons filling that high character, the proviso in the statute of Anne limiting the privilege in cases of trading applying only to the servants of the embassy." There being no limitation in the case of the sovereign, and no limitation in the case of the ambassador, is there any limitation in the case of the property? Mr. Dunlop has argued before us that in the case of property of the State there is a limitation, and that—as I understand him—if the property is used in trading, that can not be for the public service of the State. That is not the way in which he expressed it, but it appears to me to be the proposition which emerges from his argument.

We are concluded in this court by the decision in *The Parlement Belge*.[17] Sir Robert Phillimore took the view that trading with the property of a state might render that property liable to seizure; but the court of appeal in *The Parlement Belge* overruled the views of Sir Robert Phillimore, as I understand them. The principle then laid down has been recited by the other members of the court. Brett, L. J., said: "As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to its public use." One of the reasons given seems to me conclusive: the moment property is arrested in the admiralty court a proceeding is instituted against the person, and the person is compelled to appear if he wants to protect his property, and by seizing his property the personal rights of the sovereign or the personal rights of the state are interfered with. The position seems to me to be very accurately stated in the seventh edition of Hall's International Law, at page 211, where, after dealing with warships and public vessels so called, Mr. Hall goes on to deal with other vessels employed in the public service and property possessed by the state within foreign jurisdiction, and says: "If in a question with respect to property coming before the courts a foreign state shows the property to be its own, and claims delivery, juris-

[17] 5 P. D. 197, 217.

diction at once fails, except in so far as it may be needed for the protection of the foreign state."

I quite appreciate the difficulty and doubt which Hill, J., felt in this case, because no one can shut his eyes, now that the fashion of nationalization is in the air, to the fact that many states are trading, or are about to trade, with ships belonging to themselves; and if these national ships wander about without liabilities, many trading affairs will become difficult; but it seems to me the remedy is not in these courts. *The Parlement Belge* excludes remedies in these courts. But there are practical commercial remedies. If ships of the State find themselves left on the mud because no one will salve them when the State refuses any legal remedy for salvage, their owners will be apt to change their views. If the owners of cargoes on national ships find that the ship runs away and leaves them to bear all the expenses of salvage, as has been done in this case, there may be found a difficulty in getting cargoes for national ships. These are matters to be dealt with by negotiations between governments, and not by governments exercising their power to interfere with the property of other States contrary to the principles of international courtesy which govern the relations between independent and sovereign States. While appreciating the difficulties which Hill, J., has felt, I think it is clear that we must, in this court, stand by the decision already given, and the appeal must be dismissed.

THE "TERVAETE"

[1922] P. 259]

Shipping—Collision—Foreign state-owned vessel—Maritime lien—Vessel sold into private ownership—Jurisdiction—Immunity from arrest

Damage occasioned by collision with a foreign state-owned vessel does not impose a maritime lien upon the vessel, and if the vessel be subsequently sold into private ownership she is not then liable to arrest in an action in rem.

Decision of Duke, P., reversed.

Appeal from a decision of Sir Henry Duke, P., sitting in admiralty, dismissing a motion to set aside a writ in an action *in rem*.

The appellants, defendants in the action, were the owners of the steamship *Tervaete;* the respondents were the owners of the steamship *Lynntown.*

The action was brought to recover damages in respect of a collision which took place between the *Lynntown,* a British vessel, and the *Tervaete* on May 18, 1920, in the port of Bonanza, on the Guadalquivir River. At that time the *Tervaete* belonged to the Government of the King of the Belgians and was being run as a coal ship for public purposes. After the collision she was sold by the Belgian Government into private ownership, and at the time of the commencement of the present proceedings she was the property of the Société Anonyme Belge d'Armement et de Gérance. The plaintiffs issued and served their writ on January 10, 1922, the *Tervaete* being then in Barry Dock; but they refrained from arresting her in consideration of an undertaking by the solicitors for the defendants to enter an appearance and put in bail. Appearance was entered under protest, and a motion was then set down by the defendants to discharge the solicitors' undertaking and to set aside the writ.

Duke, P., held that a foreign state by its authorized agents could impose a lien upon one of its public ships, and that the lien might be enforced if it could be done without directly or indirectly impleading the foreign state. He was of opinion that the maritime lien in the present case was capable of being enforced without any assertion of jurisdiction over the Belgian State or its property, and accordingly dismissed the motion. The defendants appealed.

Argument for the appellants.

Bateson, K. C., and E. Aylmer Digby for the appellants: The court had no jurisdiction to entertain the action. As a state-owned vessel is immune from arrest, no maritime lien can attach to her, and if it never attached it can not revive when the vessel is sold into private ownership. A maritime lien does not attach in every case of collision—e. g., collisions caused through the barratrous acts of the master or, before the pilotage act, 1913, by the negligence of a compulsory pilot, do not give a right of action against the owners: See also *The Tasmania* [17] as to the position of vessels under charter.

[Scrutton, L. J. This collision took place in a Spanish port; before the admiralty court act of 1861 the court would not have entertained such an action: *The Ida.*[18]]

[17] (1888) 13 P. D. 110.

[18] (1860) Lush. 6.

No. It has, however, been held that Alexandria and Algiers are "on the high seas," because they are not within the body of a country: *The Mecca*.[19]

Maritime lien.

A maritime lien is not a lien at all; it is a claim to priority involving an action *in rem* and therefore impleads the owner of the *res*. It was defined in *The Bold Buccleugh* [20] as "a claim or privilege to be carried into effect by legal process;" and in *Currie* v. *McKnight* [21] Lord Watson described it as a remedy against the corpus of the offending ship; see also *The Dictator* [22] and *The Ripon City*,[23] where the nature of a maritime lien was fully discussed. The collision with the *Lynntown* gave her owners no claim against the then owners of the *Tervaete* which could be carried into effect by legal process; and Brett, L. J., said in *The Parlement Belge* [24] that "the property can not be sold as against the new owner, if it could not have been sold as against the owner at the time." Similarly in *The Castlegate* [25] Lord Watson said that the general principle of maritime law was that "inasmuch as every proceeding in rem is in substance a proceeding against the owner of the ship, a proper maritime lien must have its root in his personal liability;" and Sir Francis Jeune in *The Utopia* [26] made similar observations. The president, therefore, was wrong in holding that there was a maritime lien capable of being given effect to without impleading the foreign state. A dormant maritime lien attaching to a state-owned vessel necessarily diminishes the value of the state's property. A maritime lien is, in the words of Barnes, J., in *The Ripon City*,[23] a jus in re aliena, and to allow such a lien to attach at all would be a subtraction from the absolute property of the owner. The cases in which there have been cross claims against a foreign sovereign or sovereign states—e. g., *The Newbattle* [27]—stand in a different category; for if a foreign sovereign sues in a British court he submits himself to the jurisdiction of the court, and the court naturally will see that justice is done. If, therefore, there is a counter-claim or cross action the court, if necessary, will order the foreign

[19] [1895] P. 95.
[20] (1851) 7 Moo. P. C. 267, 284.
[21] [1897] A. C. 97, 106.
[22] [1892] P. 304.
[23] [1897] P. 226.
[24] (1880) 5 P. D. 197, 218.
[25] [1893] A. C. 38, 52.
[26] [1893] A. C. 492.
[27] (1885) 10 P. D. 33.

sovereign to give security: *The Newbattle* [27]. While there is no English authority on the question at issue, it arose recently in the United States, and the Supreme Court decided by a majority that no maritime lien attached in the case of collision with a Government-owned vessel: *United States of America, Owners of the Western Maid* v. *Auxiliary Schooner Liberty and Steamship Carolinian.*[28]

[Reference was also made to *The Aline* [29] and, on the position of requisitioned vessels, *The Broadmayne.*[30]]

Argument for the respondents.

C. R. Dunlop, K. C. and Dumas for the respondents: There are two questions involved. Has the admiralty court jurisdiction to entertain the action at all; and if it has, is there any ground why it should refuse to do so? As regards the locus, there can be no question that the admiralty court act, 1861, gives the court jurisdiction over cases of collision in foreign inland waters, whether the vessels concerned are British, *The Diana*; [31] or foreign, *The Courier.*[32] The argument of the appellants confuses the position of the British Crown, which can do no wrong, cf. *Tobin* v. *The Queen*,[33] with the position of a foreign sovereign, in favor of whom there is no such axiom. A foreign sovereign is not incapable of committing a tort. In *Mighell* v. *Sultan of Johore* [34] it was not suggested that the Sultan could not create against himself a good cause of action, nor in *South African Republic* v. *La Compagnie Franco-Belge du Chemin de Fer du Nord* [35] that the Republic could not commit a libel. Also, a foreign sovereign who is plaintiff is liable to have a counterclaim or cross-action brought against him: *The Newbattle.*[27]

[Bankes, L. J. In *The Newbattle* [27] the court said it could not order the vessel to be seized.]

No, but the foreign sovereign was compelled to give security to answer the cross action: see also *Strousberg* v. *Republic of Costa Rica.*[36] In *Magdalena Steam Navigation Co.* v. *Martin*,[37] in which the position of an ambassador was considered, the case appears to have proceeded on the footing that the remedy was in suspension.

[Scrutton, L. J., referred to *Musurus Bey* v. *Gadban.*[38]]

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[27] (1885) 10 P. D. 33.
[28] [257 U. S. 419].
[29] (1839) 1 W. Rob. 111.
[30] [1916] P. 54.
[31] (1862) Lush. 539.
[32] (1862) Lush. 541.
[33] (1864) 33 L. J. (C. P.) 199.
[34] (1894) 1 Q. B. 149.
[35] (1897) 2 Ch. 487.
[36] (1880) 44 L. T. 199.
[37] (1859) 2 E. & E. 94.
[38] (1894) 2 Q. B. 352.

On the second point, namely, whether the Court ought to exercise jurisdiction, it will do so unless a claim of sovereignty is asserted, and the claim must be asserted by the foreign sovereign or some one on his behalf. It is not suggested by the secretary to the Belgian ambassador that the Belgian Government objects to the action against the *Tervaete;* the affidavit in support of the motion to set aside the writ is made by the Belgian vice consul at Cardiff acting on behalf of the appellants, a commercial firm. The president was right in his conclusion that the maritime lien could be enforced without impleading the foreign government. The date when the action is brought and not the date of the contract or tort is the material date: *Munden* v. *Duke of Brunswick.*[39] The rule in *The Parlement Belge* [40] is not infringed by the present action; and the dictum of Brett, L. J., in that case, relied on by the appellants, is obiter, and further had reference to a different state of facts—the lord justice was discussing whether a lien could attach to a ship in the hands of a subsequent owner when there was no negligence on the servants of the owners at the time of the collision.

[Reference was also made to *The Ticonderoga* [41] and *The Porto Alexandre.*[42]]

Digby in reply: The fallacy in the respondents' case is their contention that there is a distinction between the case of an action against the British Crown and an action against a foreign sovereign or state, and that in the latter case the court merely declines to exercise jurisdiction, while in the former it is admitted that the court has no jurisdiction to entertain the action at all. Both cases stand on the same footing. There is no jurisdiction in either case: See *The Constitution,*[43] where the defendants being a foreign state it was held that the court had no jurisdiction to entertain the action: See also the report of *The Parlement Belge* in the admiralty court,[44] where the attorney general's protest is set out, from which it appears that the point taken was absence of jurisdiction.

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[39] (1847) 4 C. B. 321; 10 Ad. & E. 656.
[40] 5 P. D. 197, 218.
[41] (1857) Swa. 215.
[42] [1920] P. 30.
[43] (1879) 4 P. D. 39.
[44] 4 P. D. 129, 131.

Statement of facts.

July 12. The following judgments were read:

BANKES, L. J.: The material facts lie in a small compass. In May, 1920, a collision occurred between the respondents' vessel, the *Lynntown*, and the *Tervaete*, which at that time was the property of the Belgian Government and employed on Government service. Subsequently to the collision the Belgian Government transferred the *Tervaete* to a private owner, and after she had been so transferred she came into Barry Dock. The respondents contend that as a result of the collision a maritime lien attached to the *Tervaete*, which, now that she is private property and is found within the jurisdiction, they are entitled to enforce by proceedings *in rem* in the admiralty court of this country. The present proceedings were taken by the respondents to test the correctness of that contention. The respondents do not contest the proposition that as a general principle of maritime law, in the case of a claim for damage arising out of collision, a proper maritime lien must have its root in the personal liability of the owner, or of the person for this purpose in the position of owner. The subject is very fully discussed by Gorell Barnes, J., in *The Ripon City*,[45] in which he gives a definition of maritime lien in language which is, I think, of assistance in this case. He says: "Such a lien is a privileged claim upon a vessel in respect of service done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another—a *jus in re aliena*. It is, so to speak, a subtraction from the absolute property of the owner in the thing. This right must, therefore, in some way have been derived from the owner either directly or through the acts of persons deriving their authority from the owner." The respondents further do not dispute that, so long as the *Tervaete* remained the property of the Belgian Government, no proceedings could be taken either *in personam* or *in rem* in respect of the damage done to their vessel by the collision.

The contention upon which the respondents relied in the court below, and which was accepted by the president, was that the fact that no such proceedings could be taken was not due to an absence of any liability on the part of the Belgian Government for the negligence of

[45] [1897], pp. 226, 242.

their servants which brought about the collision, but to the rule introduced by international comity which prohibited the taking of any proceedings to enforce that liability. As a further contention founded upon the one just mentioned, it was said that a maritime lien did attach to the *Tervaete* as a consequence of the collision, and though it remained, as it were, dormant and unenforceable during the ownership of the vessel by the Belgian Government, it became enforceable when the vessel passed into private ownership. These contentions raise the question whether a maritime lien ever did attach to the vessel at a time when she was owned by the Belgian Government. This is quite a different case from a case where a maritime lien attached to a vessel at a time when she was privately owned, and which vessel afterwards passed into government ownership, and then into private ownership again. It may well be that in such a case the maritime lien is dormant during the period of government ownership. The present case is quite distinct from that, and involves the question whether a maritime lien ever attached to the *Tervaete* at all.

Liability of foreign sovereign.

I think it may be conceded for the purposes of the argument that the fact that a sovereign or a sovereign power can not be proceeded against in the courts of a foreign country does not exclude all idea of liability for a breach of contract, or for a tort, in the sense that under no circumstances can the sovereign or the sovereign state do wrong. The rule that where a foreign sovereign sues in the courts of this country, proceedings may be taken against him in mitigation of the relief claimed by him, would be of no value except upon the assumption that claims for breaches of contract, or for torts, might be established and set off in mitigation. In *Imperial Japanese Government* v. *P. & O. Co.*,[46] the whole discussion as to the court in which proceedings might be taken would have been avoided had the law been that the Emperor of Japan could not be liable for damages resulting from the collision of his vessel with that of the defendants. The point was, however, not suggested in that case. In *The Newbattle*[47] it was assumed that the King of the Belgians might be held liable in damages in the cross cause for the negligence of those in charge of his vessel, the *Louise Marie*. The fact that the immunity of an

[46] [1895] A. C. 644.

[47] 10 P. D. 33.

ambassador from process in the courts of this country in respect of debts contracted while he was ambassador lasts during the time during which he is accredited to the sovereign and for such a reasonable period after he has presented his letters of recall to enable him to wind up his official business and to prepare for his return home, which is the law as laid down in *Musurus Bey* v. *Gadban*,[48] points also in my opinion to the same conclusion. In the numerous cases such as *South African Republic* v. *La Compagnie Franco-Belge du Chemin de Fer du Nord*,[49] in which the question arose of enforcing cross claims in actions by sovereigns or sovereign states, it appears to me to be assumed that the cross claims are in respect of breaches of conduct or of tort actually committed, and for which the sovereign or the sovereign state would have been responsible but for the immunity from process which he or they enjoyed.

In spite of the fact that so far I have accepted the arguments of the respondents in support of the judgment of the President, I am unable to agree with his final conclusion, and I do so upon a point to which his attention does not appear to have been specially directed. The point is founded partly upon the effect upon the property of the sovereign state if a maritime lien attached to the *Tervaete* as alleged, and partly upon a consideration of the nature of a maritime lien itself. If the judgment of the president is right, and the maritime lien attached to the *Tervaete*, the value of the vessel to the Belgium Government must necessarily have been affected; how seriously of course depends upon the amount of the respondents' claim. A vessel to which a maritime lien extends for any substantial amount must necessarily be worth less in the market than if she was free from any lien. In *The Bold Buccleugh* [50] Sir John Jervis, when dealing with the question of a maritime lien, adopts Lord Tenterden's definition of it, as a claim or privilege to be carried into effect by legal process; and he then goes on to say that a maritime lien is the foundation of the proceedings *in rem*, a process to make perfect a right inchoate from the moment the lien attaches. In *Currie* v. *McKnight* [51] Lord Watson speaks of a maritime lien as a remedy against the corpus of the offending ship.

[48] [1894] 2 Q. B. 352.
[49] [1898] 1 Ch. 190.
[50] 7 Moo. P. C. 267, 284.
[51] [1897] A. C. 97, 106.

Whether a maritime lien is properly to be regarded as a step in the process of enforcing a claim against the owners of a ship, or as a remedy or partial remedy in itself, or as a means of securing a priority of claim, it can not, in my opinion, consistently with the rule of immunity laid down by the law of nations, be attached to a vessel belonging to a sovereign power and being used for public purposes. To allow such a lien to attach would be to use Gorell Barnes, J.'s, language in *The Ripon City*,[52] to create a *jus in re aliena*, a subtraction from the absolute property of the sovereign state.

I may here refer to *Musurus Bey* v. *Gadban* [53], in which the immunity from process of an ambassador was considered. It was argued in that case that it was permissible to issue a writ against an ambassador in order to prevent the running of the statute of limitation, provided no further step of serving or attempting to serve was taken. The court, taking the same view as was taken in *Magdalena Steam Navigation Co.* v. *Martin*,[54] refused to accept the contention. Davey, L. J., said: "With regard to the first" (that is the contention I have just referred to) "it is in my opinion sufficient to refer to the third section of 7 Anne, chapter 12, which makes all writs and processes, whereby the person of any ambassador or other public minister may be arrested or imprisoned, or his goods and chattels may be distrained, seized, or attached, utterly null and void. It has been decided in *Magdalena Steam Navigation Co.* v. *Martin* [54] that this section applies not only to writs of execution against the property or person of a privileged person, but also to writs which lead up to and would in ordinary course have the consequence of attaching his goods or person. If so, I am of opinion that a writ of summons in an action is of that character, and that the effect of the statute (which is said to be declaratory only of the common law) is to make such a writ void and of no effect. Mr. Pollard is quite right in saying that the writ had been served in the *Magdalena case*, and that all that it was necessary to decide was that that service was bad. But the grounds upon which the decision was based in Lord Campbell's judgment go beyond that point, and in my opinion show a total want of jurisdiction of the court to entertain the action at all.

[52] [1897], p. 226. [53] (1894) 2 Q. B. 352, 360. [54] 2 E. & E., 94,

Lord Campbell, at page 111, states the principle to be that for all juridical purposes an ambassador is supposed still to be in his own country, and he concluded his judgment in these words: 'It certainly has not hitherto been expressly decided that a public minister duly accredited to the Queen by a foreign state is privileged from all liability to be sued here in civil actions; but we think that this follows from well-established principles.' These passages, in my opinion, correctly state the legal principles on which the exemption is founded, and are in accordance with the course of decisions in our courts: See, for example, the latest case of *The Parlement Belge* in the court of appeal, in which it was said (I am reading from the marginal note, which is fully borne out by the judgment) that as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each state declines to exercise by means of any of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory. I am unable to think that the issue of a writ in an action which action the court has no jurisdiction to entertain, and which writ, therefore, the court has no jurisdiction to issue, can prevent the statute running."

It seems to me impossible consistently with the law as there expressed to hold that it is permissible to recognize a maritime lien as attaching to the property of a sovereign or a sovereign state. I see no distinction in principle between the act of the individual issuing the writ and the act of the law attaching the lien. Each equally offends the rule affording immunity. If this is the correct view of the law then the appellants are entitled to succeed, because unless a maritime lien attached to the *Terraete* while she was the property of the Belgian Government it can not attach at all. In my opinion the appeal must be allowed with costs here and below and the order made with costs relieving Messrs. Downing and Handcock of their undertaking dated January 12, 1922, and setting the writ aside and staying all proceedings thereunder.

Judgment.

SCRUTTON, L. J.: In May, 1920, the English steamer, *Lynntown*, being in the Spanish port of Bonanza on the Guadalquivir River and within Spanish territorial waters, but on the "high seas," as that term is interpreted in the English admiralty court, sustained damage by collision with the steamship *Tervaete*. The *Tervaete* had been surrendered by the German Government to the allied powers, who handed her over to the Belgian Government, whose property she was at the time of the collision. After the collision the Belgian Government sold the *Tervaete* to private owners, under whose ownership she came to Barry Dock where she was arrested by a procedure *in rem* at the suit of the owners of the *Lynntown*. They alleged that the collision gave rise to a maritime lien, inchoate till the *Tervaete* came within British territorial waters, dormant till she ceased to be the property of the Belgian Government, but which could be enforced when the *Tervaete*, as the property of private owners, came within British jurisdiction.

The owners of the *Tervaete* replied that as the *Tervaete* at the time of the collision was the property of the Belgian Government, against whom no proceedings could be taken *in personam* and against whose ship no proceedings could be taken *in rem*, no maritime lien could arise. The president, in a reserved judgment, adopted the contention of the owners of the *Lynntown*, and the owners of the *Tervaete* appeal.

In my view it is now established that procedure *in rem* is not based upon wrongdoing of the ship personified as an offender, but is a means of bringing the owner of the ship to meet his personal liability by seizing his property. The so-called maritime lien has nothing to do with possession, but is a priority in claim over the proceeds of sale of the ship in preference to other claimants. It does not appear *eo nomine* in cases of collision in the reports till *The Bold Buccleugh* [55] was heard in 1851, where it is defined as a claim or privilege upon a thing to be carried into effect by legal process; and it is stated, erroneously as is now admitted, that wherever an action *in rem* lies there a maritime lien exists. The report proceeds: "This claim or privilege travels with the thing, into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when

[55] 7 Moo. P. C. 267, 284.

carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached."

The cases as to the relation of a maritime lien to the personal liability of the owner are exhaustively examined by the late Lord Gorell in *The Ripon City*.[56] He comes to the conclusion that a maritime lien may exist, though the owner is not personally liable, where there is personal liability in those to whom he has voluntarily intrusted the control of the vessel, as charterers, though not if his intrusting is compulsory, as in the case of compulsory pilots. But for a lien to arise, in my view, some person having by permission of the owner temporary ownership or possession of the vessel must be liable for the collision. If he is so liable, a privilege or lien at once arises in this sense, that if the vessel comes within English territorial waters it may be arrested, and the claim or privilege on it will date back to the time of the lien. Any purchaser after the collision takes the ship subject to this possibility of claim.

At the time of the collision, if it happened in English waters, would it have been possible to arrest the *Tervaete* and claim a maritime lien? The well-known decision of *The Parlement Belge* compels the answer in the negative. Neither the Belgian Government could have been sued *in personam*, nor could their ship have been arrested *in rem*. If this is so, I do not understand how there could then be any maritime lien on the ship. To hold that a lien would come into existence, if the Government sold the ship to a private purchaser, would be to deprive the Belgian Government of part of their property, for such a lien about to arise must reduce the price paid to the Government and so affect the property of the Government.

The general language of Lord Watson in *The Castlegate*,[57] that "a proper maritime lien must have its root in the personal liability of the owner," approving the language of Lord Esher to the same effect in *The Parlement Belge*, and the similar language of Sir Francis Jeune in *The Utopia*,[58] appear to me entirely to support this view, even if that general language is not applicable, as Gorell Barnes, J., in *The Ripon City*[59] thought it was

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[56] [1897] P. 226.
[57] [1893] A. C. 38, 52.
[58] [1893] A. C. 492, 499.
[59] [1897] P. 226.

not, to the complicated facts in that case. And while I agree with the president that the passage in *The Parlement Belge* [60] was not strictly necessary to Brett, L. J.'s, decision, yet it was so closely related to it that coming from such a master of maritime law I have no hesitation in following it, especially as I agree with it in principle. Brett, L. J., says: "The property can not be sold as against the new owner, if it could not have been sold as against the owner at the time when the alleged lien accrued. This doctrine of the courts of admiralty goes only to this extent, that the innocent purchaser takes the property subject to the inchoate maritime lien which attached to it as against him who was the owner at the time the lien attached." In the present case no lien attached against the Belgium Government, nor could their ship have been arrested *in rem.* But if they could only sell the ship subject to the lien, their property would be affected by the lien, in that they would receive less than the value of the ship free from encumbrances or liens. The result would be that our law would assert a right over the property of a foreign sovereign not arising from any voluntary action on his part, which adversely affected his property.

I agree that a sovereign may call upon us to enforce legal rights in his favor. *The Newbattle* [47] shows that if he does so, we may refuse to enforce those rights unless he allows the legal rights we recognize to be effectively enforced against him. I agree that cases like *Gladstone* v. *Musurus Bey* [60] and *Larivère* v. *Morgan* [61] show that where English trusts are concerned, this court will proceed though foreign sovereigns' rights are concerned, while, on the other hand, *Vavasseur* v. *Krupp* [62] involves the proposition that this country will not enforce English patent rights against property in the jurisdiction which a foreign sovereign claims. I am disposed to agree that the ground of the decisions is that, though there are English rights, we do not enforce them against a foreign sovereign directly or indirectly because of the comity of nations. But it respectfully appears to me that the error of the president's judgment is that he is enforcing rights against a foreign sovereign indirectly, when he supports the view that over his

[47] 10 P. D. 33.
[60] (1862) 1 H. & M. 495; 32 L. J. (Ch.) 155.
[61] (1872) L. R. 7 Ch. 550.
[62] (1878) 9 Ch. D. 351.

property there is by English law an inchoate lien which will diminish the value of that property by lowering the price that a private purchaser will give for it.

I appreciate that the matter becomes of international importance, if States increase their commercial trading by national fleets. I have already in *The Porto Alexandre* [42] expressed my views on the disadvantage of State immunity in such circumstances. But the remedy is, in my opinion, State agreements by diplomatic action, not infringement of legal principles based on the comity of nations.

For these reasons I think the appeal must be allowed with costs here and below, and the writ against the *Tervaete* set aside.

ATKIN, L. J.: This case raises a question of considerable importance. I have found it difficult, and I differ from the reasoning of the learned president with hesitation; but having formed a judgment which is not in agreement with his conclusion I must express it.

I understand the argument made by the respondents and enforced by the president to be this. Collision damage caused by the negligent navigation of a ship creates a right in the person injured to recover damages from the owner responsible for the navigation. It also creates a right in the person injured to a maritime lien over the ship, so causing damage. That lien is not a possessory lien; but consists of the right by legal proceedings in an appropriate form to have the ship seized by officers of the court and made available by sale if not released on bail to pay the collision damage. If the ship is the property of a foreign sovereign it is admitted that legal proceedings can not be commenced against him either personally or *in rem*—i.e., for the arrest of the ship—because by comity of nations no process can be brought in the courts against the person or the property of a foreign sovereign. But this is only a personal privilege of the sovereign not to be impleaded. The right of the injured person to damages and to a lien still exists; and as the right to a lien is not abrogated when the ship is transferred into the property of a third person, so when the ship formerly owned by the foreign sovereign becomes the property of a third person not protected by the personal privilege of the sovereign, the right to a lien becomes effective, and the necessary proceedings *in rem*

[42] [1920] P. 30.

may be taken against the ship. The right to a maritime lien, it is said, is equivalent to a charge created by the voluntary hypothecation of a chattel by the sovereign, a charge which may not be capable of enforcement while the chattel is in the possession or ownership of the sovereign, but can be enforced as soon as it is transferred to the property of a third person.

A part of this reasoning is irresistible. It seems to me correct to say that the acts of a foreign sovereign may constitute breaches of contract or of duty not arising from contract which create rights in the other party. True, such rights may be of little value, as they can not ordinarily be enforced by action. But the inability is a mere personal inability to sue; they can be made effective in defense as, for instance, by set-off where the rights give rise to a power of set-off; and, as I should suppose, by a plea of contributory negligence; and should the sovereign submit to the jurisdiction in respect of a claim based upon such rights, I apprehend that the court would be bound to give effect to them.

But in my judgment upon a true analysis of what is meant by a maritime lien the right to such a lien is not such as can be created at all by the act of a sovereign. It is not a right to take possession or to hold possession of the ship. It is confined to a right to take proceedings in a court of law to have the ship seized, and, if necessary, sold. The action *in rem* is an action in which the owners of the ship are named as parties to the proceedings and in which, according to our procedure, if they appear, subject to the statutory right to limit liability, they will be made liable personally for the full damage regardless of the value of the *res*. The owner, therefore, in such an action is directly impleaded. But whether it be directly or indirectly, the owner who is a foreign sovereign can not be impleted at all. The result appears to me to be that the maritime lien against a foreign sovereign can not exist at all. A right which can only be expressed as a right to take proceedings seems to me to be denied where the right to take proceedings is denied. No independent liability of the sovereign such as a liability for debt or damages remains pendent protected only by an immunity from legal proceedings. The right of maritime lien appears, therefore, to be essentially different from a right of property hypothec or pledge created by the

voluntary act of the sovereign. If this reasoning be correct, inasmuch as there never was a time during the ownership of the Belgian Government when the respondents could aver that they possessed a maritime lien over the *Tervaete*, there was no obligation which attached to the ship or to the new owners when the ship became their property. On the explanation of the origin of a maritime lien given by Jeune, P., in *The Dictator*,[63] one may perhaps be allowed to wonder how such a right avowedly dependent upon the personal liability of the owner could be held to be enforceable against a new owner not in any way personally liable for the collision. It is too late to raise a doubt as to this point after the decision of *The Bold Buccleugh*.[64] But where there was no right against the old owner, the new owner must escape. I myself should in any case feel bound by the dictum of Lord Esher in *The Parlement Belge*,[7] referred to in the judgment of the president.

I have thought it necessary to state my views on this difficult question in my own way, because I am not sure that I feel so much pressed as my brothers with the contention that a dormant maritime lien over a foreign sovereign's ship would affect the value of the ship in his hands, and therefore must be negatived. The supposition that the liability existed as for personal claims, but was merely unenforceable, does not seem necessarily to be invalidated by the fact that such liability would impose pecuniary disadvantages upon the sovereign. A voluntary pledge or hypothec would be attended with the same results, but would it not be valid? I do not, however, dissent from their view. I concur in the views taken by my brothers of the cases cited by them and of their bearing on this case. I only desire to add a word or two on *The Newbattle* [47] in the court of appeal. There the court held that upon the construction of the admiralty court act, 1861, where a foreign Government had brought an action *in rem* against the owners of the *Newbattle*, an order could be made staying the action until security had been given by the plaintiffs to answer the cross claim of the defendant in respect of the same collision. The relevance of the case is that under the section a condition precedent of such an order is that the plaintiffs' ship can not be

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[7] 5 P. D. 197.
[47] 10 P. D. 33.
[63] [1892] P. 304.
[64] 7 Moo. P. C. 267.

arrested, and the decision of the court proceeds upon the ground that though the foreign sovereign had invoked the jurisdiction of the court and though he was under possible liability for damages in an effective cross suit, yet his ship was exempt from arrest. That a maritime lien was not enforceable under such circumstances appears to afford strong support for the view that it did not exist at all.

For these reasons I think the appeal must be allowed and the order made as stated by Bankes, L. J.

Appeal allowed.

THE "ISLAND"

January 30, 1918

(2 Entscheidungen des Oberprisengerichts in Berlin, 8)

In the prize matter concerning the Danish steamer *Island*, home port Copenhagen, the imperial superior prize court in Berlin in its session of January 30, 1918, decreed:

The appeal against the judgment of the prize court in Kiel of May 30, 1917, is dismissed. The costs of the appeal are to be borne by the claimant. The further complaint of the owners against the decision of December 12, 1919, of the prize court in Kiel is hereby disposed of.

Reasons:

Statement of the facts.

The Danish steamer *Island*, on the way from Copenhagen to New Castle in ballast, was brought to by a German war vessel on December 2, 1916, and, for purposes of a more thorough search, was taken in to Swinemunde, where seizure in prize followed on December 12, 1916.

The vessel, built in Glasgow in the year 1894, came into Danish possession in the year 1900, and, after frequent changes of ownership and name in Denmark, was sold by an agreement of November 24, 1915–July 21, 1916, by the then owner, the Steamer Island Corporation, in Copenhagen, to the claimant, Atlantic Ocean Steamship Co., a corporation in Copenhagen. The vessel, which formerly was called *Esrom*, was rechristened *Island* by the predecessor of the plaintiff. The Island Co. bought the ship in December, 1914, for 275,000 crowns; the claimant bought it for 1,000,000 crowns. According to an appraisal made at the instigation of the claimant by

three experts named by the admiralty and commercial court in Copenhagen, presented to the court of first instance, the ship is supposed to be now worth 3,120,000 crowns.

Capture by English.

In October, 1915, the ship, at that time still under the name of *Esrom*, while on a voyage from America to Sweden, was captured by the English and ordered to Hull. The English thought there was ground for the assumption that the vessel was in whole or in part German property.

Thereupon the English Admiralty, after the ship had lain idle a while, requisitioned her, despite the protest of the owners and of the Danish Government, and sailed her under the English flag from January to July, 1916.

Conditional release.

In August, 1916, the release of the vessel was accomplished on the condition that she be chartered to an English firm, and on August 16, 1916, having in the meantime been taken over by the present claimant, she set sail for Copenhagen from London, where she had lain. Here she was to be docked and undergo extensive repairs, for which there had been no opportuinity in England.

Charter to English firm.

By an agreement of August 23, 1916, the ship was chartered by the claimant to the firm of Furness, Withy & Co., Liverpool, as of September 30 at the latest. It is provided in the charter party that under certain conditions the time of delivery to the charterer may be extended still further. On December 2, 1916, after partial repairs, the vessel set out in ballast for England, and on this trip was stopped by a German war vessel. These facts, in part cleared up for the first time in the court of second instance, are incontestable in view of the records.

Claim was raised by the Atlantic Ocean Steamship Co. in Copenhagen for the release of the steamer, or compensation to the extent of 3,120,000 crowns. The claim was based on the ground that the ship as neutral was not subject to capture; more especially that the fact that for six months she had sailed under the English flag under compulsion had not brought about a change of flag.

Decision of Kiel prize court.

By decision of the prize court at Kiel on May 30, 1917, the claim was rejected, and confiscation of the vessel decreed. The prize court stands upon the ground that in truth the illegal requisitioning on the part of the English Admiralty, and the ensuing use under the English flag, did not change the nationality of the ship. It as-

sumed, however, that the charter of the ship to the firm of Furness, Withy & Co. was already running at the time of the arrest, and that this contract of charter was tantamount to a charter to the English Government, inasmuch as it was known to the prize court, through secret information to the German Admiralty staff from a reliable source, that that English firm was an agent of the English Government. It was therefore to be presumed, until the contrary was proved, that a chartering to the English Government had been consummated.

This would be conclusive in the terms of article 55 c of the Prize Code.

Terms of charter party.

Against this decision the claimants have appealed. They deny that at the time of capture the ship was under charter to the English. According to the charter party, which was produced, the charter was rather to begin on the day of the delivery of the ship to the charterer in condition to carry cargo. This, however, had not yet ensued at the time of the arrest. Furthermore, the judge of first instance errs concerning the burden of proof, in laying upon the claimant the proof that the chartering to Furness, Withy & Co. was not done in the interests of the English Government. Moreover, article 55 c of the Prize Code is a provision to be strictly interpreted one which does not permit of application by analogy. In the oral pleading before the superior prize court the claimants also contended that unneutral service, in the sense of article 55 of the Prize Code, could only be assumed if the service to the enemy was voluntary. Such was not the case here, however, because the claimant had been compelled to conclude the charter, for only under this condition was their ship released by the English. The imperial commissioner before the superior prize court denied this contention, and asked that the appeal be rejected.

Unneutral service.

This petition should be granted.

The judge of the lower court pronounced the condemnation of the vessel in accordance with article 55 c of the Prize Code, the relevant version of which reads as follows:

"A neutral ship renders unneutral service to the enemy if it is chartered by the enemy government."

Therefore, the question next presents itself whether in the present case chartering *by the enemy government* can be regarded as proved. The superior prize court

does not hesitate to affirm this in common with the judge of first instance. According to official information of the German Admiralty staff, the English firm, Furness, Withy & Co., who concluded the contract of charter with the claimant, is notoriously an agent of the English Government. There is no ground for doubting the accuracy of this information; it is, moreover, substantiated by other circumstances. The contract between the claimant and the above-named firm was concluded after the English Government had already compelled the ship to sail for six months on her account under the English flag. That this in itself involved service for the English Government is evidenced by the entry in Lloyd's Shipping Register, 1916–17—mentioned by the judge of first instance—where against the name of the vessel is noted: "Requisitioned by the Admiralty." Only upon an engagement to charter the vessel for a considerable time to an English firm was the English Government prevailed upon to give up the ship to its owners. The presumption that in reality this charter was only a mode of continuing the previous service on behalf of the English Government is therefore not refuted. In addition to this, the charter was entered into principally for trips to France and Italy. Since the English Government, as is well known, has undertaken to supply these countries with all the necessities of war, especially with coal, it goes without saying that the English Government had an especial interest in the acquisition of tonnage for this service. The contentions of the claimant tending to prove that, contrary to the assumption of the judge of first instance, in the fall of 1916 there was as yet no lack of cargo space in England, are not pertinent. Otherwise, charter rate of £8,055 a month, or about 2,000,000 marks a year, for a ship of 3,208 gross registered tonnage, for which a purchase price of some 300,000 marks was paid in 1914, would be utterly inexplicable.

Agent of Government.

Such being the state of affairs, one can not but agree with the prize court in its assumption that the steamer *Island* was chartered by the English Government. That the contract was not concluded through an official organ of the Government, or in its name, is of no consequence. According to the sense and the purpose of the provision of the Prize Code, it is sufficient that the charter was

entered into for the account of and in the interests of an enemy government.

The second plea of the claimant is to the effect that article 55 c of the Prize Code could have no application because at the time of capture the ship was not yet subject to the terms of the charter, for the latter, according to sections 1 and 26 of the original text of the contract—presented in the court of second instance—was only to come into force upon the delivery of the ship ready for loading in a port on the east coast of England. This is correct to the extent that certainly from the point of view of private law the charter had not yet begun to run; that is to say, that the obligations of the firm of Furness, Withy & Co. toward the claimant only began at the time mentioned. This civil law point of view, however, can not be decisive here. On the contrary, the matter stands thus: The ship was engaged upon this trip to England in order to fulfill the charter contract, i. e., to place itself at the immediate disposition of the charterer, arrived at the east coast of England. The sole cause and purpose of the voyage was the fulfillment of the contract, by which the ship was thus bound to undertake this voyage, too. What the decision would be had the vessel been chartered for some future period, and at the time of capture had been on a voyage in no way connected therewith, an independent, harmless carriage of freight, does not need to be discussed. In this instance the case is different, and to it article 55 c of the Prize Code must be applied. The pertinent section of the Prize Code concerns itself with direct unneutral service. The article mentioned deals specifically with service rendered the enemy government by furnishing cargo space. The declared purpose of article 55 c is, then, to prevent the increase of enemy tonnage through the charter of neutral ships. Regarded from this point of view, the unneutral service in the present instance had already begun when the steamer *Island* left in ballast for England, there to fulfill the terms of the charter.

Entering into force of charter.

It is impossible to expect of a belligerent power that it should release a ship chartered to its enemy which had fallen into its hands while on the way to assume the obligations of the charter, because in the private-law sense the charter contract had not yet begun to run. Thus the conclusion of the judge of first instance is to be assented to, even though his assumption that the charter

contract was already running at the time of the arrest of the *Island* proved incorrect in view of proofs produced in the court of second instance.

Whereas, finally, the plaintiff contends that unneutral service was not involved, because he was forced into the contract with the English firm, that does not follow. The superior prize court has already repeatedly taken a position in the negative (cf. the *Kiew*) on the question whether it is of importance that an act of which cognizance is taken in prize law be committed under the influence of psychological compulsion. As it was considered in the last-mentioned decision sufficient proof of enemy destination that the goods were on their way to enemy territory, knowingly and intentionally—even if under the influence of coercion—so, in this case, it must suffice that the ship was chartered for the English Government, even if the conclusion of the contract may not have resulted from a spontaneous decision of the owners. Moreover, in this case, the chartering did represent the desire of the owners. They could have declined to conclude the contract had they been willing to forego a profit which was only to be attained by unneutral service. As, therefore, the condemnation of the vessel was rightly decreed by the judge of first instance, and therefore no question of compensation for the plaintiff is at issue, at the same time as the decision of the main point, the further complaint of the plaintiff, against the evaluation made by the judge of first instance, can be held to have been disposed of without opposition. The judgment is therefore affirmed; costs to be decided according to section 37 of the prize court rules.

Condemnation affirmed.

THE "DRAUPNER"

June 27, 1918

(2 Entscheidungen des Oberprisengerichts in Berlin, 62)

In the prize matter concerning the Norwegian steamer *Draupner*, home port Bergen, the imperial superior prize court in Berlin, in its session of June 27, 1918, decided:

On the appeal of the owners the decree of February 22, 1918, of the imperial prize court in Hamburg is altered to this extent: The destruction of the ship is declared to have been illegal and hence the claim of the owners to compensation is legitimate. For the deter-

mination of the amount of the claim, the matter will be remanded to the court of first instance. The decision concerning the costs of the owners' appeal is reserved. The appeal of the War Risk Insurance Co. for Norwegian Ships is dismissed with costs.

Reasons:

Statement of the facts.

On November 30, 1916, the Norwegian steamer *Draupner*, in ballast from St. Nazaire to Cardiff, was brought to by a German submarine and destroyed. The ship was time chartered to the French coal firm, Compagnie de Charbons de Blanzy et de l'Ouest, in Nantes. The charter dated from August 7, 1915, and was repeatedly extended, the last time on August 9, 1916, until the end of January, 1917. Under the charter, the ship had been employed exclusively in the coal transportation service between England and France, and was at the time when it was sunk returning from such a voyage to reload in England. According to the official report, destruction ensued because, although ostensibly the ship was chartered by a private firm, in reality this firm was only a go-between for the English Government, which had secured complete disposition of the vessel in order to make use of it in fulfilling its obligation to deliver coal to France. The private firm served only to veil the real facts, in order to circumvent the provisions of article 55 c of the Prize Code.

Charter.

Judgment of Hamburg prize court.

The imperial prize court in Hamburg held the destruction of the ship valid and dismissed the claim of the owners on account of the vessel, as well as that of the War Risk Insurance Co. for Norwegian Ships on account of the effects and wages of the crew. The decision is based upon article 55 c of the Prize Code, according to which unneutral service exists if the vessel is chartered by an enemy government. It is notorious, so it was declared, that England had obligated herself to supply coal to France and Italy, and it is well known that without permission of the authorities in England no vessel may clear from an English port. How important a part coal plays in the present war needs no further elucidation. Even if it was effected between private firms on both sides, the supply of coal to France and Italy could only take place with the consent of the English Government, which, with every load, so far acquitted itself of the obligation it had assumed. All this was likewise known to and desired by the neutral owners, who, by corrections

in the original draft of the charter, had expressly revealed themselves privy to the fact that goods were to be included in the cargo which would lay the vessel open to seizure by the German forces. For such a situation the provisions of article 55 c of the Prize Code seem to have been made. During a war it is not likely that an enemy government will itself charter a vessel. They will, rather, employ private individuals for that, as was customary even before the London conference in the Russo-Japanese War, as regards the relations between the Russian Government and German shipowners. Therefore, under "chartering," in article 46 of the Declaration of London, to which article 55 c of the Prize Code conforms, reference can not be made only to the instances when the government appears itself as the charterer, but to all cases where the ship is placed at the disposal of the enemy government by means of the charter party, and the neutral owner knew and intended this.

Declaration of London.

The appeal of the owners entered against this decision appears to be well founded.

The claimants appeal in the first place to article 112 of the Prize Code. They contended, and in this court have again reverted to the contention that, according to article 112, section 2, the destruction of a neutral ship for unneutral service might only be effected if certainty existed that the fact could be proved before the prize court, and hence, that if the evidence which the ship's officer had at his command left room for doubt, the destruction must be held illegal and the claim for compensation allowed, even if later in the proceedings before the prize court, the fact of unneutral service was proved.

Destruction of neutral vessel.

The prize court was right in rejecting that contention. It requires no further argument that the Prize Code could not have intended any such contradictory provision. Article 112, section 2, of the Prize Code is not ambiguous. Its sole purpose is to keep before the mind of the commander what important consequences his decision may have, and what he must keep especially in view before he proceeds with the destruction. The judge of the first instance also raises the question whether the voyage of the ship does not involve a continuous voyage whereby the trip in ballast would be part of the carriage of the coal. He leaves it undecided whether even in this case the capture, and the final destruction, can not be justified. However, the suggestion must be thrown out.

Continuous voyage.

For even if one wishes to regard it from the point of view of carriage of contraband, one would be forced to admit that capture can no more take place on the ground of a complete carriage than on the ground of one merely contemplated but not yet begun. Therefore, only the actual stipulations of article 55 c come under consideration. The provision required—in the form in which it applied at the time the ship was captured—that the vessel be chartered by the enemy government. That in the meantime the law has been changed so that it suffices for the vessel to have undertaken the voyage in the interest of the enemy's conduct of the war, can not be regarded by the prize court, which incidentally draws no inferences from the fact, as a merely interpretive explanation. On the contrary, a new and essentially more comprehensive provision is established along with the former. Moreover, it must be observed that, so far as concerns the original version, which corresponds with the Declaration of London, the definite limitation of the general notion which is to be found also in section c is to be referred to the instigation of the German representative at London. Just on this point he opposed the more general and elastic wording of the proposition of the English. Nor can anything be concluded from that fact that the English text of the Declaration of London, instead of speaking of "chartered" vessels, speaks of those in the "employment" of the government. The French is the official text, and the more elastic expression of the English translation is to be referred to it for its true meaning.

Article 55 c of German Prize Code.

At all events, it is correct to say that it makes no difference whether the government be named in the charter as a party to the contract, whether the former be drawn up in writing or agreed to by word of mouth. On that principle the superior prize court has already rendered a decision—the *Island*. Otherwise the provision would be meaningless in practice. For there is nothing easier than to find private concerns who are ready to enter, ostensibly as contractants, into a charter party which is really being concluded for the government. It must suffice that the vessel be placed at the disposition of the government as fully as if it had itself chartered her.

So far the reasoning of the decision from which appeal is taken may be followed. On the other hand, there is

no ground for the assumption that the circumstances of the present case correspond with the fundamental requirement.

Deliveries of coal to France and Italy.

It is, of course, well known that the English Government has pledged itself to deliver stipulated quantities of coal to France and Italy. From this it may at once be concluded that the supply of this coal is dependent upon an extensive control on the part of the English Government. But contract of this sort may be exercised without the Government necessarily taking the exportations directly into its own hands. There is no support for the contention that one had entered into the execution of a Government operation in England on this behalf. When it is reported that in the countries of destination—France and Italy—committees were to be formed to distribute the necessary amount of coal in the different districts, and likewise in England committees to insure the equal distribution of the orders; if, moreover, fixed prices for the coal and fixed maximum rates for the freight were established; when, furthermore, the English Government reserves to itself the sanction of every single charter party to be concluded with a Norwegian shipowner, that all tends to prove that in regard to the supply of coal to France and Italy, the free traffic of the open freight market, even if strictly controlled and more or less limited, is in no wise excluded, and that the conveyance of the coal was not accomplished directly by the Government itself. Moreover, it must be considered that the present case concerns itself with a charter agreement with which no English firm was concerned at all, one which, on the contrary, was concluded directly between the French importer and the Norwegian shipowner.

It is not denied that our interests in the conduct of the war demanded that we combat this coal transportation by all the means at our disposal. The proposition that wars are only carried on against the military forces of the States involved in war no longer holds to-day. At all events, it does not hold of the present war, upon which the stamp of the English method of conducting war has been more and more impressed. In addition to the direct employment of armed forces, all possible means of weakening the economic life of the enemy countries are employed as measures of war, and, to that extent, one is warranted in saying that every ship taking

coal to France or Italy is opposing the purpose of our conduct of the war and supporting that of our enemy. The application of this theory to the administration of justice finds its limits at the point where positive legal axioms are encountered. On these and their observance the neutral must be able to rely, if faith in law and justice is not to be deceived and shattered. Even if the greater severity which the Prize Code assumed by the new version of article 55 c was warrantable, it still remains true that it can not be applied to a time at which it was not yet in force.

Thus the detention of the vessel is proved unjustifiable, and the appeal of the owner succeeds.

Claim of insurance company.

On the other hand, the claim of the insurance company for wages and effects of the crew was correctly denied. In the first place, it is insufficiently supported by the claimants in that a policy has neither been presented nor even an allegation set up as to who the insured is or are, whose rights the claimant is prosecuting before the prize court. The claim on behalf of wages lost is further opposed by the consideration that it is not clear what wages are involved. If it is the wages for the current voyage and if, as is to be assumed by the statement of the owners and from the claims asserted by them, the freight was paid in advance, then the amount of the wages will be made good from the compensation for the freight, which amount the owners may on no account retain for themselves. According to the assertion now made by the claimant, which has been verified by documentary evidence, it must be borne in mind that, concerning the wages as well as the effects, it is not a question of real insurance and of indemnification for an actual loss which gives the measure of the amount of damages.

Wages.

On the contrary, the claims are made in virtue of a law—which was unmistakably promulgated to counteract the aversion of sailors to service on board ship, which has become very dangerous—to give to every member of the crew, officers as well as men, a definite sum, figured in round numbers, upon the loss of their vessel, without regard to whether wages and effects had actually been lost, and if so, to what extent.

Compensation for such performances can certainly not be demanded. Granted that the capturing State is bound according to prize law to make compensation for damages, it only has to compensate for losses which have

actually occurred. But there can not be included in that the expenses that a third party—here, the State—grants to those who were involved in the affair, without regard to whether damages have occurred or not and how high they run.

Therefore the judgment is affirmed.

THE "ESPERANZA"

June 27, 1918

(2 Entscheidungen des Oberprisengerichts in Berlin, 169)

In the prize matter concerning the Norwegian steamer *Esperanza*, home port Tonsberg, the imperial superior prize court in Berlin in its session of June 27, 1918, decided:

The appeal against the judgment of the imperial prize court in Hamburg of February 22, 1918, is dismissed with costs.

Reasons:

Statement of fact. On January 15, 1917, the Norwegian steamer *Esperanza*, in ballast from Spezia to Barry, was brought to and sunk by a German submarine. The ship was chartered to the firm of Furness, Withy & Co. for 12 months under date of February 4, 1916, and had carried coal to Italy. She was on the return voyage to England to take on a new cargo of coal. Appeal is brought by the owners for the ship, equipment, and expenses of repatriating the crew and by the War Risk Insurance Co. for Norwegian Ships for the lost wages and effects of the crew.

Decision of Hamburg prize court. The imperial prize court in Hamburg held that the destruction of the ship was legal and dismissed the claims. The decision is based on article 55 c of the Prize Code, according to which one is guilty of unneutral service if the vessel is chartered by an enemy government. It is notorious, so it was said, that England had assumed the obligation of delivering coal to Italy and France, and it is known that without permission of the authorities in England no ship might leave an English harbor. What an important rôle coal plays in the present war does not need to be expatiated upon. The supplying of coal to France and Italy, even if it was effected between private concerns, could only take place with the permission of the English Government, which, with each delivery, acquitted itself to that extent of the obligation it had

Supply of coal to France and Italy.

assumed. The neutral owners knew and intended this, for by corrections in the draft of the charter they explicitly declared that they understood that goods were to form the cargo which would lay the vessel open to the danger of capture by the German forces. Such a case is provided for by the provisions of article 55 c of the Prize Code. It is unlikely in war that an enemy government should itself charter the vessel; it will rather employ private individuals for that, as was the custom even before the London conference in the Russo-Japanese War in the relations existing between the Russian Government and German shipowners. In article 46 of the Declaration of London, to which article 55 c of the Prize Code conforms, under the head of "chartering" reference must be made, not only to the case where the Government itself appears as charterer, but to all those instances in which the vessel is at the disposal of the enemey government and the neutral owners know and desire it.

Declaration of London.

The appeal of the claimants entered against this judgment fails. In his conclusion the judge of first instance must be upheld, even if the deductions in the grounds for the decision can not always be considered correct.

If at the time of capture article 55 c of the Prize Code had already been in force in the form which it acquired by the ordinance of July 29, 1917, the decision would be rendered without further ado. For it is not contested that the vessel was on a voyage from and to enemy territory and was chartered by an enemy subject. One would have to assume, therefore—as the facts do not gainsay the assumption, of which more later—that the vessel had set sail "in the interests of the enemy's conduct of the war." But the law did not yet read thus when the *Esperanza* was destroyed, and the judge of first instance can not be concurred with in assuming that the supplementary law of July 29, 1917, did not add anything new, but was rather a commentary on the law already in force. One must not forget that article 55 c of the Prize Code, like its prototype article 46 of the Declaration of London, set itself the task of circumscribing the uncertain and vague conception of unneutral service. When, under section c it is specified that the ship be "chartered by the enemy government," one may indeed say that every vessel so chartered is sailing in the interest of enemy conduct of the war. But it

Article 55 c of German Prize Code.

Charter to enemy government.

won't do at all simply to transpose the sentence. On the other hand, it is quite correct that it can make no difference whether the enemy government is designated in the contract of charter as the charterer, or whether it appears at all as party to the contract. The provision would otherwise be without practical significance, for if an enemy government wishes to secure for itself the disposition of a merchant vessel, without this fact appearing, nothing is easier than for it to employ a go-between for this purpose, who puts himself forward in place of the government in the rôle of charterer. In the sense of the provision of the law it must suffice that the government has in fact secured that control over the vessel that it would have procured by a contract of charter concluded directly with the owner.

In the cases of the *Draupner*, *Asta*, and *Saga*, decided at the same time as the present case, where the capture and destruction of the vessels took place under apparently similar circumstances, the court refused to affirm the condemnation. Here, on the contrary, the particular circumstances lead to a contrary decision.

The *Draupner* and the *Astra* were chartered directly by the Norwegian owners to French coal companies, who were outside the immediate sphere of power of England, and the *Saga* was admittedly chartered by an English firm, but nothing was known of the latter's connection with the Government. Moreover, this firm had subchartered the vessel to different firms for the current and several previous voyages, and that not only for the transport of coal. The *Esperanza*, on the other hand, was leased to the firm of Furness, Withy & Co., in London, whose relation to the English Government has already come to the knowledge of the court in the prize matter of the *Island*.

The *Island*.

In that case, too, it was a neutral ship that was chartered by the above-mentioned firm, and it was evident from the accompanying circumstances that it was a question only of the execution of a demand for the ship made by the Government in this form. The relation of this firm to the English Government, which can be deduced from the above, is fully elucidated by an incident in the English House of Commons, of which a report is given in No. 1756 of "Fairplay" for April 5, 1917. According to it, upon a question being raised in Parliament concerning rumors of excessive war profits of ship-

owners, and of the very firm in question, the latter was protected by the Government representative. He explained that "during the period August, 1914, to March 15, 1917, many neutral vessels have been chartered by Furness, Withy & Co. on behalf of His Majesty's Government;" that the Government had never paid even a commission to the firm. On the contrary, that even such commission as they draw from foreign shipowners they place to the credit of the Government and that the Government is glad to seize the opportunity to express its thanks to the company "for their ungrudging and invaluable services." So in the present case, in the charter concluded with the owners, Furness, Withy & Co. have arranged for a commission of 2½ per cent for themselves as intermediary which, it is to be assumed from this explanation of the English Government representative, has also been placed to the credit of the English Government. Further light is shed upon the facts and law of the case by the correspondence of the firm with the captain, which was found among the ship's papers. It was addressed to Palermo, and directed the captain to deliver up his cargo to the Italian Government if the consignee should not be on the spot, as they were covered against claims for recovery which might be preferred by the rightful possessors of the bills of lading. Accordingly, the charterer was in a position to deliver his entire cargo of coal to the Italian Government without regard to the possessor of the bill of lading, a fact which shows unmistakably that on the English side as well it was a question of a transaction of the Government.

In view of all this, there can be no doubt that the firm, Furness, Withy & Co., was only concerned in the matter as an organ of the English Government, and that the latter had the same power of disposition over the vessel as if it had itself concluded the charter. According to what has been said above, the requirement of article 55 c of the Prize Code seems to be fulfilled. The vessel was, therefore, legally captured, and as a sequel destroyed.

Destruction of neutral vessels

The claimants rely upon article 112 of the Prize Code. In the court of first instance they contended, and have reverted to the contention in this court, that according to article 112, section 2, of the Prize Code, the destruction of a neutral ship for unneutral service

may only take place when certainty exists that the fact can be proved before the prize court, and hence, if the evidence at the command of the ship's officer still left room for doubt, the destruction of the prize must be declared illegal and indemnity allowed, even if in the proceedings before the prize court the fact of unneutral service is proved. The prize court was right in dismissing that contention. Article 112, section 2, is not ambiguous. Its sole purpose is to remind the commander what serious consequences his decision may have, and what he must especially aim at before proceeding to the destruction.

So far as concerns the appeal of the War Risk Insurance Co. for Norwegian Ships on account of lost property and wages of the crew, this appeal also fails if for no other reason than that article 115 of the Prize Code, upon which the claimant relies, only provides indemnity for neutral *cargo*.

For these reasons, the judgment is affirmed.

THE "SYLVAN ARROW"

([1923], P. 220)

Syllabus. *Shipping—Collision—Ship under Government requisition—Officers and crew servants of Government—Action in rem for collision damage—Whether maritime lien attaches after ship released from requisition.*

While under requisition by, and manned and operated by, the United States Government, the defendants' steamship was in collision with and did damage to the plaintiffs' steamship. After the vessel had been released from requisition the plaintiffs commenced an action in rem for their collision damage. In that action the defendants pleaded (inter alia) that "at the time when the collision is alleged to have taken place the *Sylvan Arrow* was under requisition by and under the sole control and management of the Government of the United States and was being navigated by persons who were the servants of the said Government and for whose negligence the defendants were and are in no wise responsible. * * * The defendants say that the action is not maintainable in rem by reason of the facts set out" above. On the hearing of this question as a preliminary point of law:

Held, on the facts, that the defendants had surrendered their vessel to the United States Government under compulsion, that in no sense could it be said that the master and crew derived their authority from the defendants, and that in the circumstances no maritime lien attached to the vessel by reason of the collision and her owners were not, either through their vessel or otherwise, liable to the plaintiffs.

Quaere, as to where an owner voluntarily places his vessel in the possession and control of charterers or other persons, whether *The Lemington* ([1874] 2 Asp. M. L. C. 475) was correctly decided, having regard to the principles laid down in *The Parlement Belge* ([1880] 5 P. D. 197, 218) and other cases.

Action of damage by collision.

The plaintiffs were the owners of the steamship *W. I. Radcliffe*.

The defendants were the owners of the steamship or vessel *Sylvan Arrow*.

Statement of facts.

On December 1, 1918, a collision was alleged to have taken place in New York Harbor between the plaintiffs' steamship *W. I. Radcliffe* and the defendants' steamship *Sylvan Arrow*. The *Sylvan Arrow*, a vessel owned by the Standard Transportation Co., an American corporation, was at the time of the alleged collision admittedly manned and operated by officers and men appointed by the United States Navy Department, under a form of requisition charter entered into between the owners and the United States Government, pursuant to an order of requisition dated December 29, 1917. On July 6, 1922, after the *Sylvan Arrow* had been returned to her owners, the owners of the *W. I. Radcliffe* commenced the present action *in rem* against the *Sylvan Arrow*, and although the two years allowed by the maritime conventions act, 1911, for the commencement of actions had expired, they obtained the leave of the court to maintain their suit. By their defense of that action the owners of the *Sylvan Arrow* pleaded that they had no knowledge or information of the alleged or any collision between the *Sylvan Arrow* and the *W. I. Radcliffe;* that "(2) alternatively if any collision took place between the *W. I. Radcliffe* and *Sylvan Arrow*, which the defendants do not admit, the defendants deny that the collision and damage mentioned in the statement of claim were caused or contributed to by the alleged or any negligence on the part of themselves or their servants. At the time when the said collision is alleged to have taken place the *Sylvan Arrow* was under requisition by and under the sole control and management of the Government of the United States and was being navigated by persons who were the servants of the said Government and for whose negligence the defendants were and are in no wise responsible. * * * (4) The defendants say that the action is not maintainable *in rem* by reason of the facts set out in paragraph 2 hereof."

The question of law so raised was argued as a preliminary point.

Argument for defendants.

Raeburn, K. C., and Dumas for the defendants: All the old cases dealing with this matter are to be found summarized in the judgment of Gorell Barnes, J., in *The Ripon City*.[65] In every case where the owner has been found liable for damage done by his ship while she was in the possession and control of other persons it has been because the owner has voluntarily parted with the possession and control of the vessel to those other persons, and those who have been guilty of the negligence must be deemed to have derived their authority from the owner. The owner would be liable even if he had handed over the vessel to charterers under a demise charter, which put it out of his power to choose the master and crew, if he had entered into the charter voluntarily. Here there was not a voluntary surrender but a compulsory taking by the United States Government. You can not imply the owner's authority, and therefore no maritime lien attaches to the vessel and her owner is not liable.

Argument for plaintiffs.

Dunlop, K. C., and Ballock for the plaintiffs: The Documents establish that the notice of requisition was never acted upon and that at the date of the collision, the *Sylvan Arrow* was in the possession of the American Government as charterers by demise, under a charter party dated December 29, 1917, and an agreement made on July 15, 1918. It was from the charter party and agreement that the American Government derived their authority and not from the order of requisition. There is no evidence that the Government had any power to compel the owners to enter into the said charter party and agreement, or that the vessel was handed over under any compulsion. Instead of requisitioning the vessel the Government preferred to make a voluntary agreement for hire. It is none the less voluntary because, if the defendants had not agreed, the Government had power to take the vessel by a totally different proceeding. There is no suggestion in the defendants' affidavits that they entered into the agreement because they had been served with a requisition order. All they say is that they entered into a requisition charter, and for all the evidence to the contrary that charter may have been entered into at the owners' request. The return of the vessel is not a release from a requisition order but a redelivery from a requi-

[65] [1897] P. 226.

sition charter. If the owners have voluntarily given the charterer the option of putting his own crew on board and exercising sole control of the navigation, the crew are deemed to have derived their authority from the owners through the charter, and a maritime lien attaches to the vessel for damage occasioned by the negligence of the crew: See *The Lemington*,[66] the judgment in which case was approved by Gorell Barnes, J., in *The Ripon City*.[67]

[They also referred to *The Edwin*[68] and *The Tervaete*.[69]]

Raeburn, K. C., in reply: The chain of cases which include *The Ticonderoga*[70]; *The Lemington*[66]; *The Tasmania*[71]; and *The Ripon City*[67] would seem to have grown up before it was fully appreciated that the liability of the ship and the liability of the owner must march together; see, moreover, *The Parlement Belge*[7] and *The Utopia*.[72] The compulsion was to give up the possession of the ship under the requisition order. The agreement was merely as to the terms of the requisition.

July 16. HILL, J.: On December 1, 1918, the plaintiffs' steamship, the *W. I. Radcliffe*, and the defendants' steamship, the *Sylvan Arrow*, were in collision in New York Harbor. The *Sylvan Arrow* was then, and still is, owned by the defendants, the Standard Transportation Co., a private corporation, registered under the laws of the State of Delaware. It is admitted, and clearly appears from the affidavits put in, that at the time of the collision the master and crew of the *Sylvan Arrow* were the servants not of the defendants but of the American Government, appointed, employed, and controlled by the Navy Department. The issue now to be determined is whether, assuming the collision to have been caused by the negligence of those in charge of the *Sylvan Arrow*, any maritime lien attached to the *Sylvan Arrow*, and whether by reason of such lien the defendants can be proceeded against by writ *in rem* against the ship. The defendants raise this question by paragraph 2 of the defense: "The *Sylvan Arrow* was under requisition by and under the sole control and management of the Government of the United States and was being navigated by persons who were the servants of the said Government and for whose negligence the defendants were and are in nowise responsible." The plaintiffs argued that this did

Requisition.

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[7] 5 P. D. 179.
[66] 2 Asp. M. L. C. 475.
[67] [1897] P. 226.
[68] (1864) Br. & Lush. 281.
[69] [1922] P. 259.
[70] (1857) Swa. 215.
[71] (1888) 13 P. D. 110.
[72] [1893] A. C. 492.

not truly represent the facts and that the facts should be stated thus: "The *Sylvan Arrow* was chartered by the defendants as owners to the Government of the United States under a charter party operating as a demise and was therefore under the sole control and management of the Government of the United States and was being navigated by persons who were servants of the said Government and for whose negligence the defendants were and are in nowise personally responsible." The plaintiffs contend that upon those facts the ship became subject to a maritime lien, and that an action can be maintained to enforce it. They rely, of course, upon *The Lemington* [66]—a decision of Sir Robert Phillimore in 1874—and the dicta in *The Ticonderoga* [73]—Doctor Lushington, 1857 and *The Tasmania* [74] (Sir James Hannen, 1888) and *The Ripon City* [67] (Gorell Barnes, J.). Some day, and probably by a higher court, *The Lemington* [66] and those dicta and the contrary dictum of Doctor Lushington in *The Druid* [75] will have to be considered in the light of the principles so clearly laid down by the court of appeal in *The Parlement Belge* [76] by the House of Lords in *The Castlegate* [77] and by the privy council in *The Utopia.* [78] The general principle is thus stated in *The Utopia*: [79] "The foundation of the lien is the negligence of the owners or their servants at the time of the collision, and if that be not proved no lien comes into existence, and the ship is no more liable than any other property which the owners at the time of collision may have possessed. In the recent case of *The Castlegate* [77] * * * language used by the present master of the rolls in *The Parlement Belge* [76] which expresses the above view, was quoted with an approval which their lordships desire to repeat." What Brett, L. J., said was: "Though the ship has been in collision and has caused injury by reason of the negligence or want of skill of those in charge of her, yet she can not be made the means of compensation if those in charge of her were not the servants of her then owner, as if she was in charge of a compulsory pilot." In *The Castlegate* [77] Lord Watson stated the principle of the maritime law to be that "inasmuch as every proceeding *in rem* is in substance a proceeding against the

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[66] 2 Asp. M. L. C. 475.
[67] [1897] P. 226.
[73] Swa. 215.
[74] 13 P. D. 110.
[75] (1842) 1 W. Rob. 391.
[76] 5 P. D. 197, 218.
[77] [1893] A. C. 38, 52.
[78] [1893] A. C. 492, 497, 499.
[79] 2 Asp. M. L. C. 475, 478.

owner of the ship a proper maritime lien must have its root in his personal liability." He then refers to damage actions (*The Lemington* [66] and *The Ticonderoga* [73] had been cited) and says: "It was argued that the case of lien for damages by collision furnishes another exception to the general rule, and there are decisions and dicta which point in that direction; but these authorities are hardly reconcilable with the judgment of Doctor Lushington in *The Druid* [75] or with the law laid down by the court of appeal in *The Parlement Belge*,[7]" and he then quotes Brett, L. J. But it may be that for me, *The Lemington*,[79] which is a direct decision, is the governing authority. Let us see what the decision in that case and the dicta in the other cases come to. If they are law, they make an exception to the general rule. What precisely is the exception? In *The Ticonderoga* [80] the observations of Doctor Lushington appear to me to be clearly obiter. In that case it does not appear that the master and crew were appointed or paid by the charterers—the French Government—but only that the ship was under the orders of the charterers, "in the service of the French Government." In the course of his judgment he said: "I am not aware, where there has been any proceeding *in rem*, and the vessel so proceeded against has been clearly guilty of damage, that any attempt has been made in this court to deprive the party complaining of the right he has by the maritime law of the world of proceeding against the property itself. Supposing a vessel is chartered so that the owners have divested themselves, for a pecuniary consideration, of all power, right, and authority over the vessel for a given time, and have left to the charterers the appointment of the master and crew, and suppose in that case the vessel had done damage, and was proceeded against in this court—I will admit, for the purposes of argument, that the charterers, and not the owners, would be responsible elsewhere, although I give no opinion upon that point—but still I should here say to the parties who had received the damage, that they had, by the maritime law of nations, a remedy against the ship itself." Then he goes on to contrast the case of a pilot by compulsion. The next case is *The*

The Ticonderoga.

[7] 5 P. D. 197.
[66] 2 Asp. M. L. C. 475.
[73] Swa. 215.
[75] (1842) 1 W. Rob. 391.
[79] 2 Asp. M. C. L. 475, 478.
[80] Swa. 215, 217.

The Lemington. *Lemington*,[79] in which Sir Robert Phillimore said: "I think the law was correctly laid down by Doctor Lushington * * * in the case of *The Ticonderoga*;"[73] and he went on: "A vessel placed by its real owners wholly in the control of charterers or hirers, and employed by the latter for the lawful purposes of the hiring, is held by the charterers as *pro hac vice* owners. Damage wrongfully done by the *res* whilst in possession of the charterers is, therefore, damage done by the 'owners' or their servants, although those owners may be only temporary. Vessels suffering damage from a chartered ship are entitled *prima facie* to a maritime lien upon that ship, and look to the *res* as security for restitution. I can not see how the owners of the *res* can take away that security by having temporarily transferred the possession to third parties. A maritime lien attaches to a ship for damage done, through the negligence of those in charge

Maritime lien. of her, in whosesoever possession she may be, if that damage is inflicted by her whilst in the course of her ordinary and lawful employment, authorized by her owners. Whether the damage is done through the default of the servants of the actual owners, or of the servants of the chartering owners, the *res* is equally responsible, provided that the servant making default is not acting unlawfully, or out of the scope of his authority." It will be observed that in both those cases—I am not quite sure that it does not color much of the earlier judgments in this matter—the ship is spoken of as being "the guilty party." The next case is *The Tasmania*,[81] in which Sir James Hannen reviewed the cases; and in *The Ripon City*[82] Gorell Barnes, J., expressed the opinion that *The Lemington*[79] was rightly decided. Speaking of *The Parlement Belge*,[7] and the dicta I have referred to, he said: "I am convinced that the judges did not intend to decide that in no circumstances can a maritime lien be obtained unless the owners of the *res* are personally liable in respect of the claim. It will be found, in accordance with modern principles and authorities, that there are certain cases in which a maritime lien may exist and be enforced against the property of

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[7] 5 P. D. 197.
[73] Swa. 215.
[79] 2 Asp. M. L. C. 475-478.
[81] 13 P. D. 110.
[82] [1897] P. 226, 242, 244.

persons not personally liable for the claim, and who are not the persons who, or whose servants, have required the service or done the damage." A little later, speaking of a maritime lien, he says: "This right must, therefore, in some way have been derived from the owner either directly or through the acts of persons deriving their authority from the owner." Then he considers the case of a chartered ship: "The principle upon which owners who have handed over the possession and control of a vessel to charterers, and upon which mortgagees and others interested in her who have allowed the owners to remain in possession are liable to have their property taken to satisfy claims in respect of matters which give rise to maritime liens, may, in my opinion, be deduced from the general principles I have above stated and thus expressed. As maritime liens are recognized by law, persons who are allowed by those interested in a vessel to have possession of her for the purpose of using or employing her in the ordinary manner, must be deemed to have received authority from those interested in her to subject the vessel to claims in respect of which maritime liens may attach to her arising out of matters occurring in the ordinary course of her use or employment, unless the parties have so acted towards each other that the party asserting the lien is not entitled to rely on such presumed authority. In my opinion, it is right in principle and only reasonable, in order to secure prudent navigation, that third persons whose property is damaged by negligence in the navigation of a vessel by those in charge of her should not be deprived of the security of the vessel by arrangement between the persons interested in her and those in possession of her. * * * The persons interested in a vessel in placing her in the possession and control of other persons, to be used or employed in the ordinary way, must contemplate that claims may arise against her in respect of rights given by the maritime law, and may be taken to have authorized those persons to subject the vessel to those claims."

In these cases it will be seen that the liability of the ship and of the owner through the ship is based upon the fact that the negligent persons "derived their authority from the owner" and that "the owner placed the ship in the possession and control of other persons to be used and employed in the ordinary way"; and that "charterers in whom the control of the ship has been vested

by the owners are deemed to have derived their authority from the owners so as to make the ship liable for the negligence of the charterers who are *pro hac vice* owners." Let us see whether the United States Navy men in charge of the *Sylvan Arrow* derived their authority from the defendants—whether the defendants placed the *Sylvan Arrow* in the possession and control of the United States Government—whether the control of the ship was vested by the defendants in the United States Government. According to the affidavit of Mr. Ali sworn on October 12, 1922, paragraph 3, the *Sylvan Arrow* was requisitioned by the United States Government in December, 1917, and handed over under such requisition to the Navy Department on July 15, 1918, and remained under such requisition until January 21, 1919. To the affidavit of Mr. Morse (sworn on March 2, 1923) are exhibited the requisition charter party, and it is sworn that from July 15, 1918, to January 21, 1919, the *Sylvan Arrow* was under that portion of the exhibit which is designated the "bareboat" form. By an affidavit sworn in this action on July 25, 1922, Mr. D. Radcliffe for the plaintiffs stated that the plaintiffs were advised that the *Sylvan Arrow* had been requisitioned by the United States Government in December, 1917, and in the following July had been taken over by the Navy Department, and was released by the Navy Department early in 1919. It was upon the strength of that affidavit that the plaintiffs obtained leave to maintain the action, notwithstanding that more than two years had elapsed from the date of the collision. The requisition charter party exhibited is executed by the defendants and by the director of operations for the United States Shipping Board. It is headed: "Requisition charter," and begins: "This requisition charter made and concluded upon in the District of Columbia the 29th day of December, 1917." It recites: "Whereas by requisition order dated December 29, 1917, pursuant to the urgent deficiency act of the 15th of June, 1917, and the President's Executive order of the 11th July, 1917, the United States has requisitioned the use of the steamship *Sylvan Arrow* * * * and whereas it is desired * * * to fix the compensation which the United States shall pay to the owner for the use of the steamship so requisitioned and to define by agreement the rights and duties of the United States and of the owner with respect to the operation of the vessel under the requisition * * *" Now therefore it is agreed as follows:

Requisition charter.

"First. The terms and conditions under which the vessel is to be operated shall be those contained in the 'time form' hereto annexed; provided, however, that at the time of the requisition or at any time thereafter, on five days' written notice, the United States may operate the vessel under the terms and conditions contained in the 'bare boat form' hereto annexed." The time form contemplates that the Government has taken possession of the ship and delivers possession back to the owner for the owner to operate the ship for the Government; under it the master and crew are the servants of the owner. The bare-boat form contemplates that the ship shal remain in the service of the United States under the requisition order, and provides that the United States shall man and operate the vessel. It is not quite clear, but I was told that in December, 1917, the ship was still in the builders' hands. From correspondence exhibited it appears that by direction of the United States Shipping Control Committee she was handed over to the Navy Department on July 15, 1918, and in the same month notice was given that the Government would operate the vessel under the "bare boat" form of charter. The precise status of the shipping control committee does not appear, but if it was not a branch of the United States Shipping Board or of the United States Shipping Board Emergency Fleet Corporation, the correspondence shows that its acts were ratified by the corporation.

From all this I draw the conclusion that the ship was in fact compulsorily surrended by the owners to the United States Government. I am the more certain of this conclusion because the ship was an oil tanker. In 1917–18 any shipowner who had a tanker free from Government control could have become "rich beyond the dreams of avarice." I see no reason why I should doubt the affidavits or the documents which state that the ship was requisitioned. It is said for the plaintiffs that no requisition order has been produced or disclosed, and it is suggested that in fact there was no order on December 29, 1917. Whether an order was actually made or not does not seem to me to matter much. If the intention to make an order were intimated to the owner, it would be as effective a compulsion as if it were actually drawn up. The essential fact is that the owner entered into the charter party because the United States Government had power to compel him to give possession of the ship to the

Urgent deficiency act.

Government. It was also said that the method adopted by the Government was not in strict compliance with the urgent deficiency act, 1917. By section 1 (*e*) the President is given power (inter alia) to requisition, or take over, the possession of * * * any ship now constructed or in the process of construction. By section 2 the President was given power to take immediate possession if his orders were not obeyed. By section 3 just compensation was to be paid, to be determined by the President, with a power to sue to persons dissatisfied with the amount. By section 4 the President may exercise the powers through such agency or agencies as he shall determine. By Executive order the President delegated his powers to the United States Shipping Board and the Emergency Fleet Corporation. It is said that because the Government, instead of fixing the just compensation for the *Sylvan Arrow*, proceeded to enter into a charter party with the owner defining the hire and the other mutual obligations of the Government and the owner, the element of compulsion disappeared and the owner must be treated as one who had voluntarily chartered his ship to the Government. I can not agree. Underlying the whole transaction was the compulsion—the fact that the Government had and would have exercised the power to take possession of the ship whether the owner consented or not, and also had power to operate the ship by its own servants if it so chose. I am not in the least suggesting that in fact the Government did not proceed in the precise way intended by the act; but, supposing it did not, the plaintiffs' case is no better, because if it exercised a compulsion illegally it exercised compulsion; if it exercised it legally it exercised compulsion. If it was illegal the position would be analogous to that of a ship which had been seized by pirates, in which case it could not possibly be suggested that the owner of the ship should, in form of procedure, be responsible for the negligent navigation by the pirates. Such being the position, it can not in any sense be said that the master and crew of the *Sylvan Arrow*, who were the servants of the United States Navy Department, derived their authority from the defendants, or that the defendants placed the ship in the possession and control of the Navy Department, or that the control of the ship was vested by the defendants in the Navy Department.

Accepting the decision in *The Lemington* [83] and the dicta in *The Ticonderoga*,[73] *The Tasmania* [81] and *The Ripon City* [84] as sound law, the facts of the present case do not come within them. Upon those facts I hold that no maritime lien attached to the vessel by reason of the collision and that the defendants are not, either through their vessel or otherwise, responsible to the plaintiffs for the collision damage. There will be judgment for the defendants, with costs.

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[73] Swa. 215.
[81] 13 P. D. 110.
[83] 2 Asp. M. L. C. 475.
[84] [1897], P. 226.

ARMED VESSELS

H. M. SUBMARINE "E-14"

([1920] A. C. 403)

ON APPEAL FROM THE PRIZE COURT, ENGLAND

Prize court—Prize bounty—Destruction of enemy transport—Enemy "armed ship"—Naval prize act, 1864 (27 and 28 Vict. c. 25), section 42

An order in council of March 2, 1915, made pursuant to section 42 of the naval prize act, 1864, provided for the payment of prize bounty to such of the officers and crew of any of H. M.'s ships of war as were present at the taking or destroying of any "armed ship" of the enemy.

In May, 1915, a British submarine torpedoed and sank a Turkish transport having on board 6,000 Turkish troops, who had with them rifles and ammunition, also six field guns so disposed on the ship's deck that, at suitable ranges, they could have been used with effect against the submarine. The ship was a Turkish fleet auxiliary manned by naval ratings and commanded by Turkish naval officers; she carried as part of her regular equipment a few light quick-firing guns. The officers and crew of the submarine applied to the prize court for prize bounty:

Held, that the meaning of the words "armed ship" in section 42 was not limited to a ship commissioned and armed for the purpose of offensive action in a naval engagement, and that the applicants were entitled to prize bounty under the order in council.

Judgment of the prize court reversed.

Present: Lord Sumner, Lord Parmoor, The Lord Justice Clerk, and Sir Arthur Channell.

Appeal from judgments of the admiralty division (in prize) dated February 21, 1917,[1] and November 25, 1918.[2]

The officers and crew of H. M.'s submarine *E–14* by a motion in the prize court sought a declaration that they were entitled to £31,375 as prize bounty for the destruction of the Turkish transport *Guj Djeml* on May 10, 1915. The prize bounty was claimed under an order in council of March 2, 1915, made in pursuance of section 42 of the naval prize act, 1864 (27 and 28 Vict. c. 25), which refers to the destruction of any "armed ship" of the enemy.

[1] [1917] P. 85. [2] Unreported.

The president (Sir Samuel Evans), by a judgment delivered on February 21, 1917, held that the meaning of the words "armed ship" in section 42 was "a fighting unit of the fleet, a ship commissioned and armed for the purpose of offensive action in a naval engagement." He found that the evidence before him did not bring the *Guj Djemal* within that description and dismissed the application, but without prejudice to the claimants renewing it upon any further evidence that might be forthcoming.

The motion was renewed before the president (Lord Sterndale) on November 25, 1918, further evidence being adduced. The effect of the evidence given upon the two applications appears from the judgment of their lordships.

Lord Sterndale, P., considered that he was not at liberty to depart from the principles laid down in the decision above referred to, and held that the fresh evidence did not render the transport an "armed ship" within those principles. The motion was accordingly dismissed.

Argument for claimants.

October 21, 1919. Sir Erle Richards, K. C., and G. P. Langton for the claimants: Prize bounty was payable under the order in council, since upon the evidence the *Guj Djemal* was an "armed ship" of the enemy. There is nothing in the acts in force before the naval prize act, 1864, nor in the decisions, which indicates that the meaning of the plain words used should be limited as held in the prize court. [Reference was made to *Several Dutch Schuyts;*[3] *L'Alerte;*[4] *La Clorinde;*[5] *The Sedulous;*[6] 6 Anne, c. 13, s. 8; 43 Geo. 3, c. 160, s. 37; 45 Geo. 3, c.72, s. 5; 17 and 18 Vict. c. 18, ss. 3, 11.] Prize bounty has been awarded under the order in council for the sinking of ships not coming within the principle applied in the present case—namely, a patrol ship and an armed mine layer: See *H. M. Submarine E–11,*[7] and *The Konigen Luise.*[8]

Argument for Crown.

Sir Gordon Hewart, A. G., and J. G. Pease for the respondent, the procurator general. The view of the late President as to the meaning of the words "armed ship" was right. The reference in section to "the beginning of the engagement" and the basis upon which the

[3] (1805) 6 C. Rob. 48.
[4] (1806) 6 C. Rob. 238.
[5] (1814) 1 Dod. 436.
[6] (1813) 1 Dod. 253.
[7] Lloyd's List, June 26, 1916.
[8] Lloyd's List, Feb. 27, 1917.

bounty is to be computed indicate that what was meant was a fighting unit of a fleet. In the unreported cases in which during the present war prize-bounty has been awarded for the destruction of patrol ships, minelayers, or armed auxiliary ships, the point that the order in council did not apply was not taken.

Facts of case.

December 3. The judgment of their lordships was delivered by—Lord SUMNER: In this appeal the commander, officers and crew of H. M.'s submarine *E–14* seek, pursuant to 27 and 28 Vict. c. 25, s. 42, and the order in council dated March 2, 1915, to establish their right to a grant of £5 per head of the 6,000 Turkish troops, and of the 200 ship's complement, who were on board of the *Guj Djemal*, when they destroyed her with a torpedo in the Sea of Marmora, near Kalolimno Island, on May 10, 1915. The troops had their rifles and ammunition, and with them were six Krupp 75-mm. field guns, also with ammunition, and so disposed on the ship's deck astern that at suitable ranges they could have been used against the *E–14* with effect. The ship herself was part of the Ottoman naval force, a fleet auxiliary manned by naval ratings and commanded by officers of the Navy of the Sublime Porte, and she carried a few light quick-firing guns as part of her regular equipment, with which she could defend herself if necessary. At the time in question she was acting as a troop transport, and this would appear to have been her regular employment. She was on her way to the Dardanelles, and it was known to the Turkish Government that British submarines had passed up the straits for the purpose, among others, of interfering with that traffic.

"Armed ship."

By section 42 of the naval prize act, 1864, the right in question would attach if the *Guj Djemal* was, in the words of the section, "an armed ship of any of His Majesty's enemies." This is entirely a matter of construction of the section in its application to the facts of this case, and no other question was raised in the appeal. Little assistance, if any, is to be derived from prior decisions or earlier legislation. No decision before the war turned on or touched this section, and in the cases decided during the war the present contention had not been raised. The older acts go back for many generations. At one time the number of guns, and not of men

carried by the ship destroyed, was the measure of the grant, and until the Crimean War the expression, "armed ship," was not used. No settled practice was shown to have existed in the grant of "head money," as it was called, that could be regarded as affecting the ordinary meaning of the words of the section, and no reasons of policy were suggested, which would point to an intention to use those words in one sense rather than in another.

It is plain on the facts that the *Guj Djemal* was a ship, and a large one; that she was a ship of His Majesty's enemies, a unit in the Turkish fleet; and that she was armed. If then these single and undisputed facts are put together, she was in fact "an armed ship of His Majesty's enemies." Why was she not so within section 42? It is true that she was used to transport troops. It is true also that she got no chance to use her arms, or at least none that Turkish troops or seamen were minded to take; such is the nature of an injury by a well-placed torpedo. It is true that she did not go forth to battle, nor was she in any case fit to lie in the line, but the section says nothing about this. It may be that her regular service consisted in carrying troops and stores and that her combatant capacity was not high, but it can hardly be doubted that, if a suitable opportunity had occurred, it would have been her duty to fight and even to attack a hostile submarine.

The contention presented on behalf of the Crown was, that her main character was that of a transport, and that the fact that she was armed was only an incident. The section, however, does not distinguish between the purposes for which the armed ship is armed, nor does it confer or withhold the grant according as the armament carried is the main or an incidental characteristic of the enemy sovereign's ship. The contention prevailed with the late president, who gave effect to it in the following words:[9] "An armed ship, within the meaning of the section to be construed, is a fighting unit of the fleet, a ship commissioned and armed for the purpose of offensive action in a naval engagement."

Evidently this proposition is open to several objections. It makes the rights of His Majesty's forces depend on the purpose with which his enemies may have dispatched their vessel, on what either way is a warlike service. It

[9] [1917], pp. 85, 89.

employs a term, "offensive action," which, in practice, is of indefinite meaning, and in any case involves an inquiry into the state of mind of the hostile commander. Sir Samuel Evans elucidated his meaning thus in another passage: "In my opinion, if it were proved that she carried a few light guns, that would not constitute her an armed ship any more than a merchant vessel armed for self defense; nor would the fact that she carried troops armed with rifles and some field guns and other ammunition intended to be used after the landing of the troops."

Their lordships are unable to accept these propositions. Of the case of a merchant ship they say nothing, for this is a question on the meaning of the words "ship of the enemy," and the appellants did not contend, nor needed they to do so, that any ship but one in state service would be covered by those words. There is again no evidence that the rifles and field pieces were not intended to be used at sea under any circumstances, little as any occasion for their use was to be looked for, and it must be recollected that defense is not confined to taking to one's heels or even to returning a blow, but, in the jargon of strategy, may consist in an offensive-defensive, or in plain words in hitting first. No criteria would more embarrass the application of the enactment than these, and to introduce the test of the ship's commission is to introduce something which involves a rewriting of the section.

Their lordships are of opinion that the words of the section are plain, and that the facts fit them, and accordingly the appellants are entitled to succeed; that the decree appealed against should be set aside; and that this appeal should be allowed with costs, and that the case should be remitted to the prize court to make such formal decree in favor of the appellants as may be required. Their lordships will humbly advise His Majesty accordingly.

IN THE MATTER OF THE NAVAL OPERATIONS IN MESOPOTAMIA, 1914-15 (H. M. S. "*ESPIÈGLE*" AND OTHER VESSELS)

([1923], P. 149)

Prize court—Prize bounty—"Armed ship" of the enemy—Lighters carrying troops—Estimate of numbers of persons on board—Naval prize act, 1864 (27 and 28 Vict. c. 25), s. 42

By an order in council of March 2, 1915, which put into operation section 42 of the naval prize act, 1864, prize bounty at the rate of £5 for each person on board the enemy's ship was payable to such of the officer and crew of any of His Majesty's ships of war as were present at the taking or destroying of any "armed ship" of the enemy:

Held, applying the principles stated in H. M. submarine *E. 14* [1920] A. C. 403, that it was not necessary for the ship herself to carry any armament structurally attached to her, and that enemy lighters carrying troops armed with rifles were "armed ships" within the meaning of the section.

No accurate figures being available to establish the numbers of the persons on board the enemy vessels, the court, believing the claimants' estimate to have been made with the intention of accuracy, accepted it.

Motion for an award of prize bounty in accordance with the provisions of section 42 of the naval prize act, 1864 (put into operation by an order in council of March 2, 1915), on behalf of Capt. Wilfrid Nunn, R. N., and the officers and ships' companies of various sloops, launches, and other craft, as being present at the capture or destruction of the armed Turkish vessels set out in the following schedule:

Name of H. M. S. engaged	Date of capture or destruction	Name of enemy vessel captured or destroyed	Number of persons on board enemy vessel	Amount of prize bounty at £5 per head
H. M. S. Espiègle	Nov. 9, 1914	Turkish river gunboat	12	£60
Do	Nov. 19, 1914	do	12	60
Do	June 1 and 2, 1915.	Turkish gunboat Marmaris.	[1] 66	330
H. M. S. Odin		Turkish armed vessels Mosul and Bulbul.	[1] 230	1, 150
			[1] 32	160
H. M. S. Clio		7 armed Turkish barges	[1] 714	3, 570
H. M. S. Shaitan		7 armed Turkish mahelas	[1] 315	1, 575
Do	June 3, 1915			
H. M. S. Comet		Armed Turkish vessel Sebah.	20	100
H. M. S. Sumarra		Armed Turkish vessel Samarra.	26	130
H. M. S. Lewis Pelly		Armed Turkish lighter	[1] 300	1, 500
H. M. S. L. 3		3 other armed Turkish lighters.	[1] 300	1, 500
3 armed horse boats				
H. M. S. Shushan	July 24, 1915	Turkish river gunboat	12	60
Total				10, 195

[1] At least.

The facts are fully set out in the judgment.

The claim was resisted by the Crown on the ground that the vessels were destroyed in the course of joint naval and military operations. It was also contended that as it appeared from the claimants' affidavits that some of the enemy vessels were lighters and mahelas not fitted with any armament, the mere fact that they were carrying troops armed with rifles was insufficient to make them "armed" vessels within the meaning of section 42 of the naval prize act. The point was further taken that no accurate evidence was available as to the number of persons on board the enemy vessels.

Wilfrid Lewis for the claimants.

C. W. Lilley for the procurator general.

[In the course of the arguments it was contended that the decision of the privy council in H. M. submarine *E. 14* [10] was not an authority for the proposition that a lighter carrying armed men was an "armed ship." Lord Sumner, in mentioning "troops armed with rifles," was merely going through the various sorts of armaments held by Sir Samuel Evans in the court below as being insufficient, in his opinion, to constitute an "armed ship"; and Lord Sumner, dealing with the qualifications as a whole, said that their lordships were unable to accept those propositions. In fact the troopship sunk by the *E. 14* had several light field guns on board.]

March 5. The President (Sir Henry Duke) read the following judgment: These are a series of claims for prize bounty under the provisions of the naval prize act, 1864, section 42, on behalf of Capt. Wilfrid Nunn, R. N., and the officers and crews of various sloops, launches, and armed horse boats in His Majesty's service which were engaged during 1914 and 1915 in operations on the River Tigris and Euphrates against naval forces of the Ottoman Empire.

Prize bounty is payable under section 42 by distribution among such of the officers and crews of any of His Majesty's ships of war as are actually present at the taking or destruction of any armed ship of any of His Majesty's enemies of a sum calculated at the rate of £5 for each person on board the enemy's ship at the beginning of the engagement. By section 2 of the statute the term "ship of war of His Majesty" includes any vessel of war of His Majesty and any hired armed ship or

[10] [1920] A. C. 403.

vessel in His Majesty's service. Captain Nunn, as senior naval officer of the Persian Gulf division of the East Indies station, had under his command at the time of the various operations here in question a diversity of vessels, including horse boats, but there is no dispute that all the claimants' vessels come under the description of ships and vessels of His Majesty which are included in the provisions of section 42.

Statement of facts.

The operations for which prize bounty is claimed are the sinking and destruction of a Turkish river gunboat on November 9, 1914, by H. M. S. *Espiègle* near Muhammarch, on the Tigris, at a point distant some 40 or 45 miles from the river mouth; the sinking on November 19, 1914, by the *Espiègle* some miles farther up the Tigris of a Turkish gunboat, which was salved and became H. M. S. *Flycatcher*; the sinking of the Turkish gunboat *Marmaris* and capture of the steam vessels *Bulbul* and *Mosul* and the capture of numerous barges and mahelas on June 1 and 2, 1915, in the Tigris upriver from the junction of the Tigris and the Euphrates at Qurnah; the capture on June 3, 1915, at Amarah, some 90 miles upriver beyond Qurnah, of various steam vessels and lighters; and the destruction on July 24, 1915, at Nasiriyah on the Euphrates, some 120 miles beyond Basra, of a Turkish river gunboat. The distances I have stated, which are roughly estimated, indicate the extent of Captain Nunn's field of operations.

The questions raised at the hearing were whether the capture and destruction of the various vessels in respect of which the claims arise were effected solely by the respective claimants or were joint operations of naval and military forces; whether the ships and vessels captured and destroyed were "armed," within the meaning of the term as used in section 42; and what are the numbers in respect of which, if at all, these claims for prize bounty ought to be allowed.

The duty of the naval forces in Mesopotamia in course of which the vessels under consideration were captured or sunk was that of cooperation with the military expeditionary force under the immediate command of Gen. Sir Charles Townshend. Apart from this general duty Captain Nunn, as senior naval officer, was under the orders of the commander in chief on the East Indies station and of the board of admiralty.

The claims made in respect of the sinking on November 9, 1914, of a Turkish gunboat off Muhammareh Island, the sinking on November 19, 1914, of another gunboat higher up the Tigris, the sinking on June 1, 1914, of the gunboat *Marmaris*, and the sinking on July 24, 1915, of an unidentified gunboat on the Euphrates were not disputed at the hearing.

Joint action.

The allegation on the part of the Treasury that the events out of which the claims arise were joint acts of military and naval forces depended upon the scheme of the operations in which the same occurred and the terms in which the incidents themselves were described in military dispatches, the pronouns "we" and "ours" being used as to each of them, though without anything of a precise nature to indicate that the language employed was used with regard to things actually done by troops as distinguished from naval forces. The issue here depends upon ascertaining what was in fact done. At the end of May, 1915, when the Turkish forces retreated from Qurnah toward Basra, a combined advance of British troops and naval forces took place which covered the period of the disputed claims. The naval forces during this time reconnoitered for the army, conducted the transport operations when river transport was used, and from time to time successfully engaged Turkish naval forces and overtook and captured various vessels which were conveying Turkish troops and munitions—inclusive of field guns, bombs, mines, rifles, and ammunition. Sir Charles Townshend was, at material times, with an officer of his staff, on board whatever vessel was being used by the senior naval officer as his flagship, and other military officers were distributed among other vessels in the command. The bridge of the flagship commanded the surrounding country, and the general used it for purposes of observation. His communication with his forces was to some extent maintained by wireless telegraphy from the flagship. He was kept informed of what was being done under Captain Nunn's command, but he did not direct and he took no part in the operations of the naval force. On board one of the vessels was a detachment of an English regiment which had been detailed for service under naval command and which acted in the capacity of marines. The advance beyond Basra to Amarah was one in which the army and navy closely cooperated, and I believe the knowledge that troops were advancing was an inducement to the surrender by Turkish forces of some

of the captured craft. But no troops were upon the scene when any of the sinkings and captures in question were carried out, and I am of opinion, upon like grounds of principle to those which I stated in the somewhat similar case of *The Sulman Pak*,[11] that these several sinkings and captures were solely effected by the respective claimants.

Armed vessels.

The question whether the lighters and mahelas in question were armed vessels is perhaps not directly covered by H. M. submarine *E–14*,[10] to which reference was made, but guidance is to be found there which helps in its determination. On behalf of the Crown it was submitted that only the gunboats manned by Turkish naval forces were "armed vessels," so as to be the subject of claims for prize bounty. The material fact with regard to the lighters and mahelas here in question is that they were conveying armed troops who had at their disposal on board these vessels an abundance of weapons capable of being used for the destruction of His Majesty's ships and vessels which were in action against them. These troops with the weapons at their disposal could without any exceptional display of skill or courage have put out of action most, if not all, of the claimants. The substance of the question, as it was presented to me, was whether vessels so provided as these craft were must be excluded from the category of armed vessels by reason of the fact that they were not built for combatant action and had not at the time of their capture any armament which was structurally attached to them. Inasmuch as the several vessels were ships of the enemy, and in each instance carried troops "armed, or provided with arms," with which they could have fought and destroyed His Majesty's vessels (by which in fact they were destroyed or captured), I must decide this question in favor of the claimants.

No accurate figures are available to establish the numbers of the persons who were on board the several enemy vessels described in the claim at the beginning of the various engagements. It is a matter of estimate, and, as I believe the estimate of the claimants to have been made with the intention of accuracy, I accept it. There will accordingly be awards in favor of the several claimants of the amounts stated in the schedule to the notice of motion. That will be a total award of £10,500.

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[10] [1920] A. C. 403. [11] [1922], p. 73.

IN THE MATTER OF THE DESTRUCTION OF CERTAIN ARMED TURKISH VESSELS (H. M. SUBMARINE *"E. 12"*)

([1924], P. 29)

Prize court—Prize bounty—Armed vessels carrying munitions of war—Destruction of small Turkish sailing vessels—Armed ships of the enemy—Naval prize act, 1864 (27 and 28 Vict. c. 25), s. 42

Acting on the instructions of the naval commander in chief, the claimants, the officers and crew of a British submarine, sank by gunfire a number of small Turkish sailing vessels engaged in carrying munitions of war to the Turkish military bases and arsenals in the Sea of Marmora.

The vessels did not carry any armament structurally attached to them, but their crews were armed with rifles and, on each occasion when attacked, the crews took to their boats, got ashore, and opened fire on the submarine with their rifles.

By an order in council of March 2, 1915, which put into operation section 42 of the naval prize act, 1864, prize bounty at the rate of £5 for each person on board the enemy's ship is payable to such of the officers and crew of any of His Majesty's ships of war as are present at the taking or destroying of any armed ship of the enemy:

Held, that the inference to be drawn from the facts that the commander of the submarine had instructions to sink sailing craft of the sort in question and that in each case the crews, instead of scattering and making their escape, opened fire on the submarine, was that these sailing vessels had been taken under the control of the Turkish administration, and were not to be regarded merely as merchant vessels in private ownership engaged in the carriage of contraband. They were therefore ships of the enemy within the meaning of section 42.

Held, further, that the vessels were armed ships when they were attacked, and that it would give too restricted an operation to the rights provided by the statute to hold that they had ceased to be armed ships because their crews with their rifles had left before the vessels were actually destroyed. The claimants, therefore, were entitled to an award of prize bounty.

Motion for an award of prize bounty in accordance with the provisions of section 42 of the naval prize act, 1864.

The claimants, Commander Bruce, D. S. O., R. N., and the officers and crew of H. M. submarine *E. 12*, claimed declarations that they were entitled to awards of prize bounty in respect of the destruction in the Sea of Marmora, on September 21, 1915, of six Turkish sailing vessels with a complement of 30 men; and on October 5, 1915, of a steamship and 15 sailing vessels with a total complement of 70 men.

The question at issue was whether the sailing vessels were to be regarded as ordinary merchant vessels engaged in running contraband cargoes or as armed ships of the enemy within the meaning of section 42 of the naval prize act, 1864.

The facts are summarized in the headnote and are fully set out in the judgment.

Argument for claimants. Wilfrid Lewis for the claimants: The evidence in the possession of the commander in chief showed that vessels of this type were being employed by the Turkish naval authorities for the carriage of munitions of war; and it is immaterial whether they were state owned or merely chartered by the state. Their crews carried rifles, and the vessels therefore were armed ships within the meaning of section 42 of the naval prize act: *In the Matter of the Naval Operations in Mesopotamia*, 1914–15.[12] If they were armed ships, however, it is submitted that they would come within the section even if they were owned by subjects of the enemy state. This question was left open by Lord Sumner in H. M. submarine *E. 14*.[13] Although fire was opened from the shore, at the beginning of the engagement the vessels were armed, notwithstanding that the rifles then on board were not fired till a later stage.

Argument for Crown. Hilbery for the procurator general: These vessels were merely suspected of carrying munitions of war for the Turkish forces. There is no evidence that these small sailing craft were in the regular service of the enemy state or even that they had been pressed into that service. They would appear to have been ordinary merchant craft running contraband cargoes. Further, they were not armed ships when sunk or destroyed, and on that ground the case is distinguishable from *In the Matter of the Naval Operations in Mesopotamia*, 1914–15.[12]

Statement of facts. October 19. The President (Sir Henry Duke): These claims arise out of the action of H. M. submarine *E. 12*, which was detailed to enter the Sea of Marmora on various occasions when the approach was closed by naval defenses of the kind which during the war became familiar. The mere achievement of the passage into the Sea of Marmora conferred much distinction on the officers and men concerned, who had made a series of incursions before the raids now under consideration.

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[12] [1923] P. 149. [13] [1920] A. C. 403

By September, 1915, acting on the information in his possession, Admiral de Robeck, who was in command, gave personal instructions to Commander Bruce that there were certain classes of vessels with which he was to deal. I am satisfied that the commander acted on those instructions, and that so acting he destroyed and sank the vessels in respect of which the present claim is made. There is a claim in respect of the destruction on September 21 of what are described as 6 armed Turkish sailing vessels, and a claim in respect of an operation on October 5, where the service alleged to have been rendered is the destruction or sinking of an armed Turkish steamer and 15 armed Turkish sailing vessels. The sailing vessels, as far as the information before me goes, were vessels customarily engaged in time of peace in commercial business in the Sea of Marmora; normally they were commercial sailing craft, and were said to be at the time in question engaged in carrying various munitions of war. I have no doubt that they were so engaged. The positions in which they were found—in one case returning apparently from a trip to Panderma, where there were munition factories and arsenals, and on the other occasion going to or from Rodosto, where there were works used for military purposes by the Turkish authorities—make the character of their enterprise fairly clear, and they might have been captured as being vessels engaged in carrying contraband of war.

But that does not dispose of this question. In some of the evidence there was a disposition to lay much stress on the fact that these vessels were engaged in carrying munitions of war; but that fact does not by any means constitute them armed vessels of the enemy. Even if these were vessels carrying munitions of war, and having arms on board and using them, the strong impression on my mind is that those facts would not be sufficient to constitute them armed vessels of the enemy.

Commander Bruce and his brother officer, Lieutenant Commander Fox, gave evidence, and Commander Bruce told me the instructions which he received. Before he got these orders there was reason to suppose that a submarine venturing near certain classes of craft in the Sea of Marmora, and neighboring waters, would be exceedingly likely to find herself sunk by gunfire, or a bomb, or by other fire if she were in a position in which gunfire was not practicable. The vessels in question might well have engaged submarine *E. 12* with success.

On September 21, 1915, Commander Bruce says he sighted six sailing vessels, and chased them into a small bay near Panderma. The crews, numbering four or five in each vessel, abandoned their ships and fled to the shore, and immediately opened fire upon *E. 12* with rifles at a range of about 1,000 yards, and he says he sank the six.

On October 5 the *E. 12* sighted a small enemy steamer and 17 enemy sailing vessels in Rodosto Bay. The steamer was armed, and she was fired upon, and the only question with regard to her is whether she was destroyed. I will deal with that as a question of fact. It does not raise any matter of principle; she was undoubtedly an armed vessel of the enemy. [His lordship held on the evidence that the steamer was destroyed.]

The question against the claim in respect of the sailing craft is that they were being convoyed in the manner in which vessels are convoyed in time of war. The commander says in his affidavit that the crews of the steamer and the sailing ships abandoned their ships, and that "immediately the crews of the sailing vessels reached the shore they opened fire upon me with rifles, which said rifles I verily believe had been taken by the said crews from on board the said steamer and the said sailing vessels. Owing to the said rifle fire I was forced to keep 2,000 yards from the said steamer and sailing vessels when engaged in destroying them. The crews of the said steamer and the said sailing vessels kept up a heavy fire upon me for about 30 minutes, when the battery at Erekli Point, about 5,000 yards distant, opened fire upon me; an enemy destroyer then appearing forced me to dive and to abandon the task of destroying the remaining two sailing vessels." Commander Fox, in respect of the proceedings on October 5, says: "The crews of the said steamer and the said sailing vessels landed at widely divergent points, and from each of the said points at which the crews of the various vessels landed, and from nowhere else, there immediately came an intense rifle fire, causing the *E. 12* to stand off to a distance of 2,000 yards whilst the work of destruction of the said steamer and the said sailing vessels was completed. From the intensity of the fire opened upon *E. 12* I verily believe that there were at least 50 persons firing upon us." He corroborates Commander Bruce as to the other incidents.

The facts I have stated are the materials on which I have to come to a conclusion whether these sailing vessels were armed vessels of the enemy. At the hearing I found it a perplexing task. There was a simple set of facts with very rudimentary information, and the inquiry is a serious one in point of principle. The amount of money involved here is not serious, but it is a serious thing to come to the conclusion, with regard to merchant vessels carrying men on board with arms, that they are to be taken by reason of that fact to be armed vessels of the enemy. It involves considerations quite outside those relative to the subject of naval prize bounty; it affects the whole status of persons engaged in commerce in time of war.

"Armed vessels."

It was argued with regard to the sailing vessels that they were not shown to be armed vessels of the enemy, and at any rate, as it stood on the evidence, that they were not armed vessels when they were sunk. If, however, they were armed vessels when they were engaged it would take a great deal of argument to persuade me that I ought to assume that they had ceased to be armed vessels because certain men had left them with their boats and taken certain weapons. I should not decide the case upon any such ground as that; I think it would give too restricted an operation to rights intended to be created by the naval prize act, and would introduce a fine point of law into what is really a broad question of fact. If the vessels were armed vessels at all I should be ready to find that they were armed vessels at the time that they were sunk. Were they armed vessels? There is no evidence that they had any mounted arms or that they had been fitted for naval warfare, but the authorities have acquiesced for some time in the view that that is not conclusive. Manned by men instructed in the use of and armed with rifles, they were vessels sufficiently armed to have sunk submarines. Submarines had to keep 2,000 yards away from the shore because of the risk of being sunk, and I come to the conclusion that these were at all material times armed vessels.

The next question is whether they were armed vessels of the enemy. I have said enough on the question of their being found with munitions, or material for the manufacture of munitions, on board, as to whether that would be sufficient to make them armed vessels of the enemy. I do not find that it would. But I must look

"Of the enemy."

further than that. I must try to see whether these vessels had been taken up by the Turkish authorities and taken under their control, and put in a position for offensive or defensive operations as part of the service of the forces afloat engaged in the military service of the Ottoman Government. It is true that I have not much information, but I am struck, and the more I have reflected on it I have been the more struck, with the action of the crews of the several vessels on the several occasions as to which I have had evidence. On each occasion these men, who, on the hypothesis presented against the claim, are only seamen whose chief concern is to make their trip and to make it in safety, do not scatter and get out of the way, do not get into their boats and put up a flag or signal of some kind, but each vessel sends out an armed crew, positions are taken up along the shore, and rifle fire is opened upon the submarine and maintained, in the first instance until the operation of sinking these vessels is complete, and in the second instance until a fort at a distance of 2½ naval miles opens fire upon the submarine, and a Turkish destroyer approaches with the probability of sinking the submarine. Is that like the conduct of merchant seamen engaged in commercial traffic? I can not conceive that it is. I have the strongest possible suspicion, amounting in fact to conviction, that these men did what they were there to do. I do not regard the naval arrangements of the Turkish administration as I would regard the naval arrangements of an administration with a highly organized naval service, like those of the great European powers; it is not the same thing at all. On the hypothesis, a party of merchantmen are earning their daily bread on the sea, and yet they behave on successive occasions in the manner I have indicated, showing that they were an effective belligerent force. They engaged this submarine and might very well have sunk it. What does that mean? I should have had a very definite suspicion as to what it meant without the affidavit of Sir Oswyn Murray, who spoke of this transaction as an "engagement," although the term is not used in any technical sense, but merely by way of description. I think he was perfectly accurate, and that there was an engagement, fought by armed ships which had been taken under the control of the Turkish administration by some means best known to themselves, and that these

had become armed vessels of the Turkish administration. But there is something more. Admiral de Robeck, before Commander Bruce and his comrades set out on this expedition, told them that certain craft were to be sunk. Nobody can suppose for a moment that an officer in His Majesty's service would be told to sink mere merchant ships, even though they were carrying contraband. What does it mean? I have nothing beyond the plain evidence of the officers, and it seems to me that I must take it that these vessels, which were replenishing the stores of the arsenals and munition factories on the Sea of Marmora, were provided for in the way of defense by the Government which was using them, and that the practically certain consequence of the approach of a submarine was that they would endeavor to sink her by the various means with which they were supplied. That seems to me to be a strong circumstance in this case. There is much which is left to conjecture and presumption, but on the best consideration I can give to the case, and with no disposition to enlarge the provisions of the naval prize act by any careless consideration as to what are the circumstances under which prize bounty arises, I find that these sailing vessels were armed vessels of the enemy.

There will be an award of prize bounty in the sum claimed, £500.

SEARCH IN PORT

THE "BERNISSE" AND THE "ELVE"

([1920], P. 1)

Prize court—Damages against the Crown—Diversion of neutral vessels—Absence of reasonable cause—Neutral vessels sailing from allied port—Order in council of February 16, 1917—Practice—Stay of execution—Security for costs—Payment out.

Two neutral vessels, bound from a French colonial port to Rotterdam with cargoes of ground nuts, were stopped by a British cruiser just outside the area declared by Germany to be a prohibited area in which any neutral vessel would be liable to be sunk by German submarines. The vessels had all the requisite documents of clearance from the French port, including an "acquit à caution"—a document permitting the export of the cargo—but had not got the "green clearances" which were given to vessels which had called at a British port.

By clause 1 of an order in council of February 16, 1917, adopting further reprisals against the unlawful acts of Germany, "a vessel which is encountered at sea on her way to or from a port in any neutral country affording means of access to the enemy territory without calling at a port in British or allied territory shall, until the contrary is established, be deemed to be carrying goods with an enemy destination, or of enemy origin, and shall be brought in for examination, and, if necessary, for adjudication before the prize court." The vessels were sent in for examination to Kirkwall, and when in the submarine area one of them was sunk by a German submarine and the other was damaged. In an action against the procurator general for damages:

Held, (*a*) that the order in council had no application to a vessel which sailed from a British or allied port; (*b*) that the absence of the "green clearance" therefore afforded no reasonable ground for sending the vessels into Kirkwall; (*c*) that as no other reasonable ground was suggested, the Crown was in the position of a wrongdoer and could not excuse itself from returning the vessels to their owners by the plea that it was unable to do so by reason of the wrongful or criminal act of the German submarines; and (*d*) that accordingly there must be a decree of restitution with costs.

Held, further, that although the Crown obtained a stay of execution pending appeal, the plaintiffs were entitled to have the sums paid into court as security for costs paid out to them.

Actions tried together for damages against the Crown.

The plaintiffs were P. A. Van Es & Co., the owners, and the masters and crews of the steamships *Bernisse* and *Elve*.

The defendants were "H. M. procurator general or other proper officer of the Crown in its office of Admiralty," and Commander William G. Howard, R. N., commanding officer of H. M. S. *Patia*, and Lieut. Wilfrid E. Rogers, R. N. R.

The plaintiffs claimed costs, expenses, losses, and damages occasioned by reason of the seizure of the respective vessels and their cargoes by H. M. S. *Patio* whilst, "with the license and authority of the French Government" they were sailing from a French port (Rufisque) to Rotterdam, and by their "unwarranted diversion from a safe channel of navigation to Kirkwall through an area which to the knowledge of the said captors was declared by Germany to form part of their blockade area to be entered into by neutral vessels at their own risk," and where the *Bernisse* was torpedoed and had to be beached and the *Elve* was torpedoed and sunk.

By their answer the defendants pleaded that the statement of claim disclosed no cause of action. They alleged that the vessels were encountered on their way to Rotterdam, "a port affording means of access to enemy territory," and that the defendant Howard thereupon, through the defendant Rogers, ordered the vessels to proceed to Kirkwall for examination. The loss sustained by the plaintiffs was due to the action of the German submarines and not otherwise.

The circumstances under which the vessels were seized are summarized in the headnote, and are fully stated in the judgment.

Argument for plaintiffs.

May 14, 15. Sir Erle Richards, K. C., and Bisschop for the plaintiffs. The vessels were bound from a French colonial port with documents which amounted to a license from the French Government to carry their cargoes to Rotterdam; the documents should have satisfied the naval authorities and the vessels should have been allowed to proceed. They were outside the German submarine area when visited, and, even assuming there was a right of visit and search, the authorities had no right to send the vessels to Kirkwall for examination, and thus expose them to the risk of the German submarines.

They were small vessels and there was a smooth sea, and they ought to have been searched at sea. On the general right of search see "Diplomatic correspondence between the United States and belligerent governments relating to neutral rights and commerce," published in the American Journal of International Law, volume ix, pages 55 et seq., and volume x, pages 73 et seq. and 121, the result of which is that H. M. Government admitted that if visit and search at sea are possible and can be made sufficiently thoroughly to secure belligerent rights, it would be a hardship on neutral vessels to compel them to go into port. See also Oppenheim's International Law, volume ii, page 539.

There must be cause for suspicion before a neutral vessel can be sent into port, and if captors improperly and without reasonable cause, although through an honest mistake, seize a vessel which is not in fact open to any ground of suspicion, the captors are liable in damages and costs: *The Ostsee.*[1] It is contended by the Crown that these vessels were encountered on their way to Rotterdam, "a port affording means of access to enemy territory." That is a reference to the retaliatory order in council of February 16, 1917, but that order can not apply to these vessels as they left an allied port and therefore were under no obligation to call at a British port in the course of their voyage. The seizures were wrongful, and therefore the Crown is liable to the plaintiffs for the loss of the *Elve* and the damage to the *Bernisse.*

Argument for defendants.

Sir Gordon Hewart, A. G., Sir Ernest Pollock, S. G., and Bruce Thomas, for the defendants. The "acquit à caution" was merely a customhouse document, and the plaintiffs' evidence merely establishes that if stopped by a French cruiser the vessels "probably" would have been allowed to proceed. It was impossible, having regard to the German submarine peril, to examine any vessel, however small, at sea, and the naval authorities were bound to send all vessels into port for search. In fact, these vessels were "bound to a country which afforded access to enemy territory," and on the wording of the order in council it is at any rate an arguable question whether the order did not apply, although the vessels were bound from an allied port. But it is unnecessary to argue the question—the meaning and scope of the order

[1] (1855) 9 Moo. P. C. 150.

were fully argued in *The Leonora* [2]—for even if the order be held not to apply, damages would not be imposed upon the Crown as a consequence of the mistaken construction of the order: *The Sigurd.*[3] In *The Ostsee*[1] there was no possible right to detain the vessel as no blockade existed until some three weeks after the capture. That case, therefore, has no application to the present circumstances. Unless the possession is tortious and unjustifiable the captors are not responsible: *The Betsey;*[4] see also *The Maria* [5] and *The John.*[6] Even assuming the seizure and ordering into port were unjustified, they were not tortious acts, and the captors are not responsible for the consequence of the illegal acts of the Germans in committing acts of piracy contrary to all the principles of civilized warfare.

[The PRESIDENT. If you take possession of a neutral vessel without any reasonable cause you are in no better position than that of a wrongful bailee of goods, and it is no answer to the owner of the goods to say that somebody else by a wrongful act has destroyed them.]

The Crown was rightly in possession. There was clearly a right of visit and search, and the sending into Kirkwall was merely ancillary to and a prolongation of that right. See *The Zamora.*[7] It was in no sense a capture or seizure as prize. An officer should not be deprived of the benefit of his bona fides if in the course of exercising the right of visit and search he erroneously takes the view that further investigation is necessary. Further, in order to impose responsibility for the loss caused by the illegal acts of the Germans, it must be established that in sending the vessels into Kirkwall they were thereby exposed to greater risk. There is no evidence of that; the risk in searching them at sea would have been as great or greater, and they were equally exposed to submarine attack had they continued on their voyage to Rotterdam.

Sir Erle Richards, K. C., replied.

July 25. The PRESIDENT (Lord Sterndale). In this case a claim was made on behalf of the owners of the steamships *Bernisse* and *Elve* for damages against the Crown arising from damage to the *Bernisse* and the loss of the *Elve*, and the question which arises lies in a narrow com-

[1] (1855) 9 Moo. P. C. 150.
[2] [1918] P. 182; [1919] A. C. 974.
[3] [1917] P. 250.
[4] (1798) 1 C. Rob. 93.
[5] (1803) 4 C. Rob. 348.
[6] (1818) 2 Dods. 336.
[7] [1916] 2 A. C. 77.

pass but is not easy to decide. It is whether in the circumstances the Crown, acting by the admiral in command of the cruiser patrol at the place where the vessels were stopped, had reasonable cause for detaining them and sending them into Kirkwall.

Statement of facts.

The facts, so far as it is necessary to state them, are as follows: The two vessels were small steamers of about 950 tons gross, owned by P. A. Van Es & Co., and at the time were under charter to a firm called the N. V. O. Cie Fabriken Calve to carry a cargo of ground nuts from Rufisque, a port in the French colony of Senegal, to Rotterdam. The cargo was consigned to the N. O. T. and was shipped at Rufisque by a company called the Nouvelle Société Commerciale Africaine. This company had obtained permission to export the nuts from the governor general of French West Africa, and the requisite documents of clearance, which will be more particularly described later, were obtained for the shipments. The two vessels made their voyages under the charter in company, and the facts as stated apply to both of them.

This was the second voyage made by them to the port of Rufisque for a cargo of ground nuts. On the former they went by the southern route, i. e., through the English Channel, and were visited, but not searched, on the outward voyage. They loaded a similar cargo and left Rufisque on February 14. They obtained the following documents: The *déclaration de simple exportation*, the *manifeste de sorties*, and what is called the *acquit à caution*. This is a document permitting the export of cargo on security being given by the shippers, guaranteed by a substantial firm of merchants that the cargo shall be delivered at the port of Rotterdam within three months. On the homeward voyage the vessels were visited in the Downs and the ships' papers examined. After an interval of several days, which I was informed was increased by some misunderstanding as to the return of the papers, they were allowed to proceed and arrived in Rotterdam and discharged their cargo. As I understand the evidence the cargo was kept under the supervision of the customs until it was certain that it was being used only for the purpose of being converted into oil in Holland, and was not being exported. On April 4, 1917, the vessels left Rotterdam in ballast on the second voyage, and on this occasion they took the northward route by the north of Scotland.

They were visited by British cruisers on April 11 and 13, but were allowed to proceed, and arrived at Rufisque on April 25, 1917. There they again loaded a cargo of ground nuts, and left for Rotterdam on May 2, 1917, carrying the same papers as on the former voyage. It was not disputed that these papers were in order for a vessel leaving the port of Rufisque. The vessels again took the northward route, and on May 20 were stopped by H. M. S. *Patia* and boarded by an officer from her. They were stopped in latitude 62° 4′ N. and longitude 15° 10′ W., which is just outside the area declared by the Germans to be prohibited, and one in which any vessel was liable to be torpedoed and destroyed by submarines. After examination of their papers and some communication between the boarding party and the cruiser, and the cruiser and the admiral, they were ordered into Kirkwall. The masters protested, because their course to Kirkwall would take them through the prohibited area and expose them to danger from submarines, but they were told that they must go, and that a wireless message had been sent into Kirkwall for an escort. They therefore proceeded, each having a British officer and some men on board who took charge of the ship, and on May 23 they were attacked by a German submarine, which torpedoed both vessels, with the result that the *Elve* sank and the *Bernisse* was badly damaged, but succeeded in continuing her voyage to Kirkwall. There she was temporarily repaired and eventually reached Rotterdam. It was stated that the submarine fired on the crew as they were getting into, and while in, the boats, but no lives were lost. It was for this loss and damage that this claim was made, and the liability of the Crown seems to me to depend upon whether there was reasonable ground for detaining the vessels and sending them into Kirkwall. It was argued on behalf of the Crown that there was no liability unless the result of the order was to expose the vessels to greater danger than they would have incurred if not sent into Kirkwall, and that the danger from submarines was just as great on the ordinary course to Rotterdam as on that to Kirkwall. I do not think that this argument is well founded. If the Crown had no reasonable grounds for taking possession of the vessels and diverting them from their course it is a wrongdoer, and can not excuse itself from returning the property to the rightful owners by saying that it can not do so by reason

of the wrongful or even criminal act of a third person. (See *The William*[8] and Pratt's Story, p. 39.) But if it be necessary to determine the question, I have no hesitation in finding that although there was danger from submarines outside the prohibited area, it was much greater within, and that therefore, by reason of the action of the Crown the vessels were exposed to greater danger.

Examination in port.

It is therefore necessary to consider whether there was any reasonable cause for putting the vessels in charge of a British officer and crew, and taking them into Kirkwall. In my opinion this depends upon the question whether in the circumstances the absence of what is called a green clearance formed such a justification. Wider questions were argued during the case involving the whole question of the rights of a belligerent to send a vessel into port for examination instead of examining her at sea, as was the practice in former times. I do not think this case raises that question, for I am satisfied upon the evidence that the officer who stopped the vessels was satisfied that there was nothing connected with the papers, or the cargoes of the vessels, which required further search to be made, and that no one considered that there was any reasonable ground for detaining the vessels any longer, or sending them in for examination, except the absence of the so-called green clearance. I shall deal with the evidence on this point later. A green clearance is a card, so called from its color, employed during the war to show that the vessel to which it is given has been cleared either from a British port of departure or a British port of call, and derives its importance in this case from the provisions of an order in council of February 16, 1917, which recites what is declared to be the improper and unlawful action of Germany and the necessity for further reprisals than had been taken before, and then proceeds: "A vessel which is encountered at sea on her way to or from a port in any neutral country affording means of access to the enemy territory without calling at a port in British or allied territory shall, until the contrary is established, be deemed to be carrying goods with an enemy destination, or of enemy origin, and shall be brought in for examination, and, if necessary, for adjudication before the prize court." The green clearance shows that a vessel has either come from or has called at a British port, but it is

[8] (1806) 6 C. Rob. 316.

to be observed that a vessel which has called at an allied port has complied with the conditions of the order just as much as one which has called at a British port, and yet such vessel will not have a green clearance, but some clearance corresponding to it according to the law of the allied nation to which the port belongs.

The facts so far as it is necessary to state them are as follows: When the vessels were stopped a lieutenant, R. N. R., was sent from the British cruiser and boarded the vessels. He examined the papers, and it is not disputed that so far as they went they were in order, but there was no green clearance. Amongst them was the document previously mentioned, called an *acquit à caution*, which has been translated as an acknowledgment subject to security. It is not a very legible document, but no objection was taken to it on that ground, and there was no suggestion that the officer did not read it and understand it. In effect it was a clearance of the goods and a permit to export them subject to an undertaking by the shippers, guaranteed by a substantial firm of merchants as to the destination of the goods. It also contained a statement that an authority to export the cargo of nuts had been obtained from the governor general. By the bills of lading the goods were consigned to the N. O. T., and the papers showed a shipment at, and a voyage from, a French colonial, and therefore an allied port, with all the regular clearances and papers necessary in the circumstances. Acting on instructions the lieutenant asked if the master had a green clearance and was told he had not, and he reported the whole facts to the commander of the cruiser. The commander of the cruiser thought the case was an exceptional one and therefore communicated with the admiral to know what he was to do, giving to the admiral all the information which he himself had, and received in answer an order directing him to send the vessels into Kirkwall. An armed party was then put on board and they proceeded on the voyage to Kirkwall. The evidence of the commander of the cruiser is, in my opinion, so important on the question of the reasons for sending the vessels to Kirkwall that I propose to give it in some detail. [His lordship read the evidence and continued:] This evidence, in my opinion, shows clearly that the vessels were not sent in for search in the ordinary sense of the word and that the officers concerned were of opinion that there was

no reason for detaining them, or sending them in, except the absence of a green clearance. It also shows, in my opinion, that in sending them in the officer concerned did so in execution of the powers of the order in council of February, 1917, and for no other reason, and therefore I think the issue in the case is narrowed to the question whether there was reasonable ground for thinking that the provisions of the order in council applied to this case.

Order in council, February, 1917.

I have already pointed out that a vessel might strictly comply with the conditions of the order by calling at an allied port and still have no green clearance, but it seems to me clear that the order has no application to a vessel which leaves a British or allied port and that such a vessel is not obliged to call at another British or allied port in order to escape the presumption raised by the order in council and the consequent sending in for examination and possible adjudication. I am therefore of opinion that the absence of a green clearance afforded no reasonable ground for sending these vessels to Kirkwall, and as no other reasonable ground was suggested I think there must be a decree of restitution with costs. I do not think there is any ambiguity or difficulty in the terms of the order in council and that it clearly did not apply to this case.

My judgment is based entirely upon the conclusion I draw from the evidence in this particular case that the vessels were not sent in for search in the ordinary way, that the officers were satisfied that there was no ground for so sending them in, and that the sole cause for so doing was that they were considered to come within the provisions of an order in council which had no application to the case. It has no relation to the general question of the right to search a vessel in port instead of at sea.

Leave to admit an appeal.

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ENEMY VESSELS AND CARGO

THE "BLONDE" AND OTHER SHIPS

([1922] 1 A. C. 313)

ON APPEAL FROM THE PRIZE COURT, ENGLAND

Prize court—Outbreak of war—German ships detained in British ports—Requisition—Owners' rights to release—Applicability of Hague convention—German misconduct of war—Effect of peace treaty—Treaty of Versailles, Part VIII, annex 3, article 1; Part X, article 297—Hague convention No. VI, articles 1, 2, 6.

Article 2 of Hague convention No. VI, provided that a belligerent may not confiscate an enemy merchant ship detained in the belligerent's port at the commencement of hostilities, but may "merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of payment of compensation."

The applicability of the above article between two belligerents does not depend upon whether they have mutually agreed to allow days of grace as contemplated in article 1; article 2 is obligatory, while article 1 is optional. Whatever may be the true meaning of the condition in article 6 that the convention is to apply only "if all the belligerents are parties," Great Britain during the recent war frequently recognized that the convention was binding, and thereby waived the right to rely upon nonfulfillment of the condition.

The conduct of Germany during the war in committing many acts in flagrant defiance of the Hague conventions does not prevent article 2 of the sixth convention from being binding upon Great Britain. Apart from considerations of municipal law, it is not the function of a prize court, as such, to be a censor of the general conduct of a belligerent, as distinct from his dealings in the particular matters before the court, or to sanction disregard of solemn obligations by one belligerent because it reprehends the whole behavior of the other.

Where a detained ship has been requisitioned under Order XXIX of the Prize Court Rules, 1914, and sunk, the German owner, if entitled to restoration under article 2, is entitled to the appraised value as the compensation provided for by article 2, and that right exists although the ship was sunk by German hostile action.

Part VIII, annex 3, article 1, of the treaty of Versailles operates to transfer to the allied and associated powers the property in all German ships of 1,600 tons and upward. The former owners of ships of that tonnage therefore have no *locus standi* before the prize court under article 2 of the sixth convention, nor right to discuss how those powers may deal *inter se* with the ships. But annex 3 effects no transfer of ships of lesser tonnage, at least until selected for surrender.

Article 297 of the treaty does not annul or modify the obligations under the convention. The claim of Great Britain thereunder to retain ships to the release of which the German owners are entitled under article 2 of the convention is not one for determination by the prize court, but orders of the prize court for release should contain a provision to prevent rights under the treaty from being defeated.

Three ships, each of under 1,600 tons gross, owned by a Danzig corporation and detained in a British port at the commencement of hostilities, were requisitioned under Order XXIX for the service of the Crown; while so requisitioned one of the ships was lost by grounding, and one by German hostile action. Applying the various considerations above stated, an order was advised that the appraised value of the two lost ships, and the ship remaining in specie, be released to the custodian of enemy property to be delivered to the Danzig corporation, if after six months no proceedings had been begun for delivery to the Crown, otherwise to abide the final determinations of those proceedings.

Judgment of the prize court [1921] P. 155 reversed.

Further advised, on petitions, that certain German ships of 1,600 tons gross and upward detained as above should be released to the Crown, the orders for detention being discharged.

Appeal from a judgment of the admiralty division (in prize) delivered on January 23, 1921;[1] also, petitions and cross petitions for the release or condemnation of enemy ships.

The appellants, a corporation registered at Danzig, appealed from a decree of the president (Sir Henry Duke) condemning the steamships *Blonde*, *Hercules*, and *Prosper*. The ships were registered at Danzig, and were respectively of 613, 1,095, and 759 tons gross. They were seized in British ports in August, 1914, upon the commencement of hostilities with Germany. In January, 1915, the prize court made orders in the form in *The Chile*[2] for the detention of the ships until further orders. They were requisitioned for the service of His Majesty by orders made by the prize court under Order XXIX of the Prize Court Rules, 1914. While under requisition the *Blonde* had been lost by grounding and the *Hercules* was sunk by an enemy torpedo.

Upon application by the procurator general in 1920 for condemnation of the ships, the president (Sir Henry Duke) held that the special provisions in the treaty of Versailles as to Danzig left the appellants, for the pur-

[1] [1921] P. 155. [2] [1914] P. 212.

pose under consideration, in the same position as if they had remained German subjects; and, following his decision in *The Marie Leonhardt*,[3] he held that in the absence of agreement between Great Britain and Germany to the contrary, German merchant ships found in British ports at the commencement of hostilities were subject to condemnation. The learned president accordingly condemned the ships; the present appeal was from that decree.

There were also before the privy council petitions and cross petitions relating to the *Gutenfels* and certain other German steamships. In the case of each of these ships the privy council upon appeal [4] had made order, similar to the order in *The Chile*,[5] for detention until further orders. The present petitions and cross petitions were on the part of the respective owners for the release of the ships, and on the part of the Crown for their condemnation. Each of these ships was of over 1,600 tons gross. The arguments were heard together with those in the appeal, and the present judgment of the judicial committee in the appeal deals also with the petitions and cross petitions.

Hague Convention VI.

The Hague Convention, 1907, No. VI, provided (inter alia) as follows:[6] Article 1: "When a merchant ship belonging to one of the belligerent powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace * * *." Article 2: "A merchant ship, which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the preceding article, or which was not allowed to leave, may not be confiscated. The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation." Article 6: "The provisions of the present convention do not apply except between contracting powers, and then only if all the belligerents are parties to the convention."

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[3] [1921] P. 1.

[4] E. g. [1916] 2 A. C. 112; [1918] A. C. 500 and 501*n*.

[5] [1914] P. 212.

[6] The official English translation appears in the Blue Book, Miscellaneous, No. 6 (1908) [Cd. 4175.]

Treaty of Versailles.

By the treaty of Versailles, 1920, Part VIII, annex 3, Article 1, Germany ceded to the allied and associated powers all German merchant ships of 1,600 gross tons and upward, and an unascertained moiety of certain smaller ships. By Part X., Article 297, the allied and associated powers reserved the right to retain and liquidate all property, rights, and interests within their territories belonging to German nationals. By Part III, Articles 100–109, Danzig was constituted a free state, and special provisions were made as to property within its territory. By Article 105 the ordinary residents of Danzig were to lose their German nationality, in order to become nationals of Danzig.

Argument for appellants.

1921, October 28, 31; November 1. Sir John Simon, K. C., and Inskip, K. C., (Balloch with them) for the appellants. The appellants are entitled to the release of the *Blonde*, and to the appraised value of the *Prosper* and *Hercules* under Article 2 of Hague Convention No. VI. That article applies whether or not there was an agreement between Great Britain and Germany to allow days of grace as contemplated by Article 1. That point was raised in argument in *The Gutenfels*;[7] it was alluded to in the judgment but not decided. In *The Turul*[8] the judicial committee regarded Article 2 as not being dependent upon Article 1. The appellants' contention on this point was not urged before the president, because in *The Marie Leonhardt*,[9] and other cases the president had given effect to a different view. Apart from the convention, the diplomatic correspondence between Great Britain and Germany during the early months of the war amounted to a mutual agreement to restore ships detained in port at the outbreak of war. Article 6 does not prevent the convention from applying. Both Great Britain and Germany were parties to it when the ships were detained; it is not material that certain countries which became belligerents during its progress were not parties. A contrary view would lead to curious results, as was pointed out in *The Möwe*.[10] The convention rested principally upon compromise, and could not be expected to exhibit the comprehensiveness of a code: *Procurator in Egypt* v. *Deutsches Kohlen Depot*.[11] The right to restora-

[7] [1916] 2 A. C. 112, 116, 119.
[8] [1919] A. C. 515, 518.
[9] [1919] P. 1.
[10] [1915] P. 1, 12.
[11] [1919] A. C. 291, 301.

tion under the convention or agreement is not affected by the provisions for the cession of ships and property contained in the treaty of Versailles. By the treaty the ships became vested in nationals of the Free State of Danzig created by it, and no right to condemn arose till a later date. The effect of the treaty was to recognize that the property of the appellants as a Danzig corporation was free from the incubus of German ownership. In any case the provision as to the cession of ships does not apply, since all these ships are under 1,600 tons gross. Having regard to Order XXIX, Rule 4, of the Prize Court Rules, 1914, the appellants are entitled to the appraised value of the ships sunk while requisitioned.

Argument for Crown.

Sir Ernest Pollock, S. G. (Sir Gordon Heward, A. G., and Wylie with him) for procurator general, respondent to the cross appeals. The three ships, as enemy ships seized in port at the outbreak of war, are subject to condemnation in the absence of any agreement to the contrary: *Lindo* v. *Rodney*.[12] There was no agreement to the contrary by virtue of either the convention, or the correspondence relied on. Articles 1 and 2 of the convention must be read together; article 2 does not apply unless an agreement has been made as to days of grace. That view was conceded in *The Marie Leonhardt*[3]; there is no decision of the judicial committee to the contrary. Further, the convention did not apply because the condition in article 6, namely, that all the belligerents should be parties, was not fulfilled. The United States were not parties; nor were Serbia, or Montenegro, all of which countries were belligerents. The words "all the belligerents" in article 6 can not be limited to those who were belligerents at the time of the seizure. That view was indicated in *The Möwe*.[13] The correspondence relied on did not amount to the agreement alleged. The essential character of agreements of this kind is reciprocity: *The Santa Cruz*.[14] (1) In *The Gutenfels*[15] it was said that the convention involved a "reciprocal obligation," and the question whether article 2 applied was left open to see whether Germany observed her position of reciprocity. Germany did not do so. As appears from a communication to Madrid in October, 1915, Germany planned to recover retained ships visiting neutral ports while requisitioned. That was a repudiation of article 2, which

[3] [1921] P. 1.
[12] (1782) 2 Doug. 212*n*.
[13] [1915] P. 1.
[14] (1798) 1 C. Rob. 49, 62.
[15] [1916] 2 A. C. 112, 119.

recognized the right to requisition retained ships. By a note addressed to Siam on March 30, 1917, Germany maintained, in answer to neutral protests, that the convention was not binding upon any of the belligerents. These repudiations put an end to any obligations on the part of Great Britain to Germany under the convention, or under the agreement, if there was one. Further, in the course of the war Germany by her conduct showed an intention not to be bound by any convention or agreement.[16] That released the obligation of this country. It is not contended that there arose a right to retaliate, but that there ceased to be that continued reciprocity by Germany which was a condition to the convention being binding. The observations in *The Nereide*[17] are therefore not applicable. The appellants were German nationals until the treaty made them nationals of Danzig; for the purpose now considered they are in the same position as if they were still Germans.

Sir John Simon, K. C., in reply: The prize court is not entitled to survey the conduct of Germany to see if the sixth convention should be applied. There is no evidence that Germany refused to be bound by article 2. The claim to retain the ships under the treaty is not one for the prize court to determine.

Upon the petitions and cross petitions there appeared:

Sir Gordon Hewart, A. G.; Sir Ernest Pollock, S. G., with Darby, Wylie, Trehern, Pearce Higgins, and H. L. Murphy in the several cases.

Sir John Simon, K. C.; Inskip, K. C., and Balloch for the shipowners.

1922, February 10. The judgment of their lordships was delivered by—

Judgment of the court.

Statement of facts.

Lord SUMNER: These are consolidated appeals from the president's judgment rejecting the claims of the appellant company for release with compensation and condemning the vessels in question, the *Blonde*, the *Prosper*, and the *Hercules*. They were small German steamers, two under

[16] The record (pp. 34 to 65) contained an affidavit by the procurator general which is of historical value. It set out, with particulars as to dates and statistics, misconduct by Germany under the following heads: (*a*) sinking by submarines of merchant ships (including passenger ships) and fishing vessels, without warning and with consequent loss of civilian lives, including women and children; (*b*) sinking by submarines of hospital ships with loss of life; (*c*) bombardment of undefended coastal towns by naval forces; (*d*) air raids on undefended towns and cities with loss of civilian inhabitants; (*e*) promiscuous laying of mines and consequent sinking of neutral and other ships; (*f*) compulsion of population of occupied territories to take part in military operations against their country; (*g*) deportation, enforced labour, and unjustifiable penalties inflicted on those populations; (*h*) use of poison gas and liquid fire. Provisions of the Hague conventions, 1899 and 1907, which werei nfringed by the above acts were set out in the affidavit.

[17] (1815) Cranch, 388, 422.

800 and one under 1,100 tons gross, which at the outbreak of the war happened to be in London and Liverpool, and were seized and proceeded against in prize. Orders were in due course made for their detention in the form which was settled in *The Chile*,[2] and followed in many cases during the war. Shortly afterwards they were requisitioned by order of the court for the use of His Majesty, and passed into the service of the admiralty. Two have since been lost while under requisition—the *Blonde* by grounding off Flamborough Head, and the *Hercules* through being struck by an enemy torpedo. The *Prosper* still remained in the hands of the Crown under the requisition order at the time when the case was heard.

The appellants are a shipping company registered and carrying on business at Danzig, where the ships also were registered, and at the outbreak of war they owned a number of the shares in each vessel, though not all; but they have been throughout treated as the full owners for all present purposes. Danzig having become a free city under the treaty of Versailles, the appellants, as citizens of Danzig, claim to be in a better position in these proceedings than if they had still been subjects of the German Empire, and no point has been taken on behalf of His Majesty's procurator general that, as Danzig was not a party to The Hague conventions, citizens of Danzig should not be allowed to claim the benefit of them. All that is said is that, in respect of Germany's actions during the war, the appellants, as they enjoyed the benefit, must also take the burden, although, as regards disabilities and liabilities imposed on Germany by the terms of the treaty of Versailles, they may escape, having ceased to be Germans at the moment when the treaty first became operative. The principal point is one turning on The Hague conventions of 1907, which, though not argued below owing to some misunderstanding as to the state of the authorities, must be dealt with on one or other of the present groups of appeals. The appellants claim the benefit of the sixth convention, or in the alternative of a supposed agreement to the like effect, arrived at *ad hoc* by Great Britain and Germany in the early months of the war. The procurator general denies that the sixth Hague convention ever became ap-

[2] [1914] P. 212.

plicable, first, for want of ratification by all the belligerents, and secondly, because article 1, on which the appellants rest their claim, would only apply if Great Britain had put article 2 in force, which never was done. As to the supposed agreement *ad hoc*, he says that the negotiations were entered into for other purposes and, further, broke down without conclusion.

Offer of days of grace.

The history of the matter is this. Early in August, 1914, pursuant to an order in council of August 4, a proclamation was issued, which declared that German ships in British ports would be detained, but that His Majesty proposed ultimately to apply the sixth Hague convention, provided that a secretary of state certified before midnight of August 7, that he was satisfied, from communications received, that Germany had expressed a similar intention. This period expired without the receipt of any sufficient communication, and the fact was duly intimated to the admiralty. Thereupon, it is said, the sixth Hague convention, so far as Great Britain and Germany were concerned, failed to come into operation, and accordingly the provisions of article 2 had no effect in the late war.

Diplomatic correspondence.

In spite of this notice to the admiralty, communications passed between the two powers through the good offices of the diplomatic service of the United States. Letters and telegrams were exchanged, and sometimes they crossed one another. The German Government were concerned not merely as to the treatment of detained ships under the sixth convention, but also as to that of the crews under the eleventh. They asked whether His Majesty's Government intended to observe the provisions of these conventions, and in what sense they understood some of their obscurer terms. By the end of September or the beginning of October both parties had stated distinctly that the sixth convention would be observed, and had expressed their construction of it, in senses which were substantially identical. As to the eleventh, though not far apart, it does not appear, on the documents which are forthcoming, that they were ever in absolute accord. Their lordships were not informed that His Majesty's Government ever published this correspondence at the time as the formal record of a new agreement therein arrived at.

The learned president came to the conclusion that this correspondence, viewed as a negotiation for a final agree-

ment, never passed beyond the stage of mere negotiation, the discussions as to the two conventions not being severable and no agreement having been arrived at as to the eleventh convention. The contrary was strenuously urged before their lordships. Logically, however, there is a prior issue—namely, whether this correspondence was entered upon or was pursued as a negotiation intended to lead to a new international agreement at all. The treaties and conventions which courts of prize are accustomed to construe and give effect to are written instruments duly executed and ratified. It is a novelty to call on them to spell out such an agreement from a series of messages passing to and fro. Here there is not so much as a protocol, and although no doubt consensus ad idem is fundamentally necessary to an international agreement, as it would be to a private offer and acceptance under municipal law, it does not follow that in the intercourse of sovereign States every interchange of messages, some formal and some informal, should be deemed to result in a new and binding agreement as soon as the parties have reached the stage of affirming identical propositions. Each power was anxious to know the intentions of the other, and in their lordships' opinion their object, and their sole object, was to ascertain whether and in what way effect would be given to the old agreement—namely, the sixth Hague convention, and was not to enter into a new agreement dealing with the same subject and tending to the same effect, but concluded under conditions as embarrassing and with a result as superfluous as could be imagined.

It is true that expressions are to be found on the German side, in the latter part of these communications as well as at the outset, which are not inappropriate to a negotiation for, and to the conclusion of, a new agreement. The German Government in August states its acceptance of a British proposition to release merchant ships, made in the order in council of August 4, and in October declares that "there now exists between the German Government and Great Britain an agreement as to the treatment of merchant ships." These expressions were not, however, adopted by His Majesty's Government. They throughout stated their intention to abide by the sixth Hague convention, provided Germany would do the same, and there are dispatches from Germany at the end of August and in September which show that this, which was the

real aspect of the matter, was fully recognized by the German Government. The language of the communications, when carefully examined, does not support but displaces the theory that a new agreement was in negotiation between belligerents to effect what could have been better secured by reciprocal recognition of a convention, to which both parties had adhered while they were still at peace.

In the result His Majesty's Government became satisfied that there existed on the German Government's part such an intention to observe the convention reciprocally as justified them in proceeding publicly to observe the convention for their own part, and thenceforward orders were made in the prize court, at the instance of the Crown, which were always regarded as being framed to carry out the obligations of the sixth Hague convention, while securing the interests of this country in the possible event of Germany's failing at the conclusion of the war to be of the same mind as to her obligations as that which had been manifested at the beginning. Their lordships may further observe that, on balance of the importance of the German merchant ships detained by Great Britain against that of British merchant ships detained by Germany, the latter power had a strong material interest in continuing to execute the convention to the end, and was little likely to intend to abandon or to desire to forfeit the ultimate advantages, which observance of the convention would assure. It therefore becomes necessary to consider in what the obligations of that convention consist according to its terms.

Applicability of sixth Hague convention.

Article 6 of the sixth convention of 1907 declares that "the provisions of the present convention do not apply except between contracting powers, and then only if all the belligerents are parties to the convention." The French text for the last part of this sentence reads: "et seulement si les belligérants sont tous parties à la convention," and there may be significance in the different positions in the sentence occupied by the respective words "all" and "tous." Of the powers belligerent in some theater or other and against one combination of opponents or another during the late war, Serbia and Montenegro never ratified the convention in question. The United States were not parties to it at all. At the time when the ships now under discussion were first detained, Germany had not declared war on Serbia, nor

had Serbia become formally the ally of Great Britain, and, so far as their lordships are aware, actual hostile action by Germany against Serbia and actual military support to Serbia by Great Britain both belong to later stages in the war. A nice question arises, therefore, whether Serbia was a belligerent in such a sense that her failure to ratify the convention prevents its being applicable as between Germany and Great Britain in the matter of these ships? If the position of Serbia does not prevent the obligations of the convention from attaching, still less can this result from that of the United States, who were not one of the "contracting powers." To put the point otherwise, are the "belligerents," who are to be taken account of for the purposes of this article, the belligerents merely who detain or suffer detention, or are they all the powers who are simultaneously engaged in war, whether acting in alliance or in direct conflict with one another or not? Is the adherence of all the belligerents, however remote from each other or unconnected with the ships and their detention, the consideration for the attaching of the obligation of any one of them, or are the mutual promises of the powers concerned—that is, of the detainer and the detained—a sufficient consideration to bind them both together? Mutuality is of the essence of the convention. Is that mutuality complete if the detaining sovereign and the sovereign of the ships detained ratify and abide by the convention, or is it imperfect, so as to prevent the application of the convention, unless and until other powers in no way concerned in the ships or their fortunes, but merely connected with one or both of those sovereigns in the general war, have likewise ratified and likewise abided by the convention, whether or no they have ships or harbors, and whether or no they make or suffer captures or are ever directly affected by maritime war at all?

It is very hard to credit that the operation of an agreement, so earnestly directed to the attainment of the highest practical ends in war, should have been deliberately made to depend on the accidents or the procrastinations of diplomatic procedure in time of peace, even when no real relation existed between the condition and the consequence, between the ratification of all the parties and the detention of the ships of one of them. Their lordships, however, have not found it necessary to give a final answer to these questions. Whether in the

circumstances of these cases the convention was applicable or whether it might be successfully objected that it had never become applicable, the result is the same, for the objection is clearly one that can be waived, and in their lordships' opinion it was waived by His Majesty's Government, alike by the whole tenor of the above-mentioned correspondence and by the whole attitude of the Crown in matters of prize affecting such cases as these throughout the war. De facto as well as de jure the position of Serbia and the other powers, as regards both the convention and the conduct of the war, was well known to His Majesty's Government at all material times. Yet days of grace were in fact allowed to Austrian ships by proclamation dated August 15, 1914, as to which see *The Turul.*[18] *The Chile* [5] order was wholly inept if the convention had and could have no application, and the Crown should have applied to the court not for leave to requisition, but for decrees of condemnation. The fact that, in spite of the doubt expressed by Sir Samuel Evans, P., in *The Möwe*[10], the Crown acquiesced in numerous orders in that form and never asked for condemnation of these detained ships so long as hostilities lasted, is conclusive to show that any right to rely on the nonfulfilment of article 6 was waived. The arguments of the attorney general on behalf of the Crown in the case of *The Gutenfels* [19] and *Procurator in Egypt* v. *Deutsches Kohlen Depot* [20] are of especial importance in this connection.

In construing such an international instrument as that now in question, it is profitable to bear in mind from the outset sundry considerations, which are not the less important for being doubtless somewhat obvious. It results from deliberations among the representatives of many powers, in which none can expect without some concession to insist upon his country's interests, its language, or its law. It is expressed in what is by tradition the common language of international intercourse, but it would be unreasonable in the circumstances to expect of it either nicety of scholarship or exactitude of literary idiom. Neither the municipal law nor the technical terms of the negotiating countries can be expected to find

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[5] [1914] P. 212.
[10] [1915] P. 1, 12.
[18] [1919] A. C. 515.
[19] [1916] 2 A. C. 112, 115.
[20] [1919] A. C. 291, 292.

a place in its provisions. Where interests conflict, much must be allowed to the effects of compromise; where the principles, by which future action is to be guided, are laid down broadly, leaving to the powers concerned the actual measures to be taken in execution of those principles, it is unreasonable to expect a greater precision than the circumstances admit of, or to reject as incomplete provisions which are expressed without much detail and sometimes only in outline.

On the other hand, it is specially necessary to discover and to give effect to all the beneficent intentions which such instruments embody and which their general tenor indicates. It is impossible to suppose, whatever the imperfections of their phrasing, that the framers of such instruments should have intended any power to escape its obligations by a quibbling interpretation, by a merely pedantic adherence to particular words, or by emphasizing the absence of express words, where the sense to be implied from the purport of the convention is reasonably plain. Least of all can it be supposed that His Majesty's Government could have become parties to such an instrument in any narrow sense, such as would reserve for them future loopholes of escape from its general scope.

Articles 1 and 2.

Turning to articles 1 and 2 of the sixth Hague convention, it is important to remember that, before its date, and since its date whenever it is not in force, the law of nations permitted and entitled a belligerent to make prize of an enemy merchantman found within his ports at the outbreak of war (*Lindo* v. *Rodney* [21]). It is true that in several instances during the nineteenth century belligerents mitigated the rigour of the rule and granted days of grace for the free departure of such vessels. The practice was certainly modern, but it was neither uniform nor universal, and on each occasion it rested with the belligerent to elect whether the rule recognized by the law of nations should be mitigated or not. It is not surprising that the negotiators of 1907 got no further than agreeing that permission to depart freely, within a time to be fixed by the power entitled to capture, was a thing desirable indeed, but not obligatory.

Under these circumstances it is asked with much force: Why should powers, who could not agree that days of

[21] 2 Doug. 612*n*.

grace should be given at all, find themselves able to concur in a more extensive modification of the law then existing and to agree that ships, unable to avail themselves of permission to depart, should not be made prize but should only be detained? The argument finds some support in the fact that the article dealing with days of grace precedes that limiting the right to such condemnation, and in the further fact that article 2 certainly is closely allied with article 1 and is so far dependent on it that instead of stating the circumstances in which it applies, as a self-contained article might be expected to do, it finds their definition only in a reference to the first article and to those circumstances mentioned in it, which depend on the choice and the clemency of the capturing power. Why, then, should powers, which fail to agree to such a modification of belligerent right as is involved in the grant of days of grace, be deemed capable of the graver modification which is involved in abandoning the right to capture and being intent with a right to detain?

The true question, however, is not why they should have but whether they have done so, and it may be usefully met, if not completely answered, by asking another. The powers, great and small, assembled at The Hague in 1907 in what was undoubtedly a great effort, involving mutual concessions and separate sacrifices, to regulate and to humanize the practices of maritime war. Is it consistent with their dignity or with the seriousness of the negotiations to read a part of their handiwork as meaning that a belligerent need not spare an enemy ship in his own port at all unless he chooses, but that, if from good nature or improvidence, he waives his right to bar her exit absolutely, he is to be bound by convention to do more than he chooses to do by express grace, and may then only detain, when otherwise he could seize? To say that the compact expressed in article 2 has been providently entered into in case two belligerents should reciprocally grant days of grace under article 1, but that until that event happens it is a mere foretaste of things to come, is to attenuate this convention to the very verge of annulling it. It is all the more unworthy of such an occasion to place so narrow a meaning on the article, because the length and character of the opportunity for departing in peace rests entirely with the grantor of it. In itself a concession requiring immediate departure differs only notionally from a belligerent act inhibiting

departure altogether. Is the modification of belligerent right to take place only in the one case and not in the other? and, if so, on what show of reason can it be founded or to what inveterate prejudice or ingrained self-interest has so illogical an arrangement been conceded?

Articles 3 and 4.

Articles 3 and 4, however, which are strictly in *pari materia*, seem to place the matter beyond doubt. Article 3 contains no reference to articles 1 and 2. It deals with a case to which days of grace and opportunities of departure have no application—that is, to ships that are found by their enemy at sea on the outbreak of war. The argument is unaffected by the fact, that as to this article Germany made reservations at the time when the convention was ratified, for the effect of the reservation is limited to the article with which it deals. A reservation as to a part of the convention is quite consistent with adoption of the rest of it. The article, clearly and independently of the others, requires that such ships, though by the law of nations good prize, may not be confiscated—that is, seized and brought before a court of prize for condemnation. They may only be detained—of course, under the order of such a court and upon conditions imposed by it. Further, when article 4 comes to deal with cargo on board "vessels referred to in articles 1 and 2," it prescribes the same measure of liability as that laid down in article 3, and describes that prescription as being an identical principle. Their lordships, therefore, think it clear that in effect this convention says: "Ships which find themselves at the outbreak of war in an enemy port shall in no case be condemned, if they are not allowed to leave, or if they unavoidably overstay their days of grace, but it would be better that they should always be allowed to leave, with or without days of grace." In effect, while article 1 is only optional, article 2 is obligatory. They reject the construction which makes the prohibition upon confiscation depend on a prior election to do what article 1 desiderates but does not require.

Effect of German method of conducting war.

Assuming that the sixth convention was binding on this country in the early stages of the war in such a sense as would prevent the condemnation of these vessels at the end of it, the procurator general further contends that during its progress Germany has by her conduct given this country the right to refuse to be bound any

further by its terms so far as German ships are concerned. It appears that in 1915, though the fact did not become known to His Majesty's Government till afterwards, the German foreign office instructed the German diplomatic officials in Spain to inform the owners of these detained ships of the arrival of any of them in Spanish ports when navigating under requisition. The object of this instruction seems to have been to give the owners the opportunity of taking proceedings in Spanish courts, if so advised, for recovering possession of them in Spanish waters under judgments pronounced for the purpose. It does not appear whether any such proceedings were ever taken, or, if so, with what result. Furthermore, in correspondence with the Government of the King of Siam the German foreign office had advanced, as a ground for refusing to be bound by the eleventh Hague convention, that it had never been ratified by all the then belligerent powers. Finally, it was contended that the many outrageous and indefensible measures adopted by Germany during the war, and especially her defiance of the Hague conventions applicable, notably by the use of poisonous gas and of contact mines, by the destruction of hospital ships, the deportation and forced employment of civilians, and the bombardment of open towns, amounted to an intimation that she intended to repudiate all obligations, and especially all conventional obligations, as to the conduct of war, and thus gave to Great Britain the right to treat herself as released from her correlative obligation under the sixth Hague convention of 1907. There are two obvious flaws in this argument. First, so far as concerns the intentions of Germany she may have flagrantly disregarded obligations which fettered her freedom of action to her disadvantage. It does not necessarily follow that she intended to repudiate a convention under which she stood to gain largely in the long run. There is, in fact, no evidence of any conduct on Germany's part down to the conclusion of the armistice which put it out of her power to return detained ships in pursuance of article 2. Secondly, so far as concerns the consequent rights of this country, even if the rules of English municipal law as to the discharge or dissolution of contracts be applicable to a case arising between sovereign powers, repudiation by Germany could do no more than give to this country the right to accept that repudiation and to treat

the convention as no longer binding. There is no evidence whatever that this was ever done; indeed it is plain that His Majesty's Government continued, down to the conclusion of hostilities and even to the conclusion of peace, to treat this convention as binding. Most, if not all, of the *Chile* orders had been made by the end of 1916, since which date, as well as before it, most of the facts now relied upon were notorious, yet no step was taken to obtain a "further order" in any case, and it is to be observed that the reason for making provision for a "further order" was not doubt as to the declared intentions of Germany with regard to recognition of the convention, but uncertainty as to the continuance of that intention on her part. If so, in the language of the English cases, the contract was kept alive for the benefit of both parties, since one party can not of his own choice put an end to it by disregarding its obligations, and so long as the contract subsists, each party can claim the fulfilment of the provisions which are in his favor, just as he remains bound to answer for his disregard of obligations which he ought to satisfy. Their lordships, however, do not rest their conclusions on rules applicable to private contracts in English courts. The principle of ascertaining the intention of the parties to an agreement by giving due consideration to what they have said is no doubt valid in international matters, but there are many rules both as to the formation, the interpretation and the discharge of contracts, which can not be transferred indiscriminately from municipal law to the law of nations. They prefer to rely on a wider ground. It is not the function of a court of prize, as such, to be a censor of the general conduct of a belligerent, apart from his dealings in the particular matters which come before the court, or to sanction disregard of solemn obligations by one belligerent, because it reprehends the whole behavior of the other. Reprisals afford a legitimate mode of challenging and restraining misconduct, to which, when confined within recognized limits and embodied in due form, a court of prize is bound to give effect. In a matter, however, which turns on the obligation of a single and severable compact, the court must inquire whether that very compact has been discharged, and ought not to be guided by considerations arising only out of the general conduct of war. Their lordships are clearly of opinion that neither in regard to the in-

structions given to the German Embassy in Madrid, which were after all a domestic matter and were at most a threat never communicated by Germany to His Majesty's Government; nor to the answer given to the Government of the King of Siam, which not only was *res inter alios acta* but related to a separate convention and proved nothing as to the German Government's intention to observe Convention VI.; nor in regard to the general delinquencies of the German forces during the war, is it possible to find juridical grounds for releasing His Majesty's Government from their obligations under the sixth Hague convention, when once they had attached. It has not even been shown that on the termination of the war Germany was not willing to return such British ships as she had detained, in so far as they had not been previously released under the armistice or otherwise.

Orders of release.

It would follow from the foregoing considerations that the owners of the vessels in question would be entitled to orders of release, but now arise the difficulties, that of these vessels only one survives, and that all matters occurring during the war are, as between German claimants and the procurator general, now to be considered in the light of the treaty of Versailles.

Compensation.

Article 2 of the sixth convention, after prescribing that the belligerent's right is limited to detention of the ship "under an obligation of restoring it after the war without compensation," proceeds: "or he may requisition it on condition of paying compensation." What is this compensation, and when and in what events is it to be paid? The question is material, because during the period of requisitioning the *Blonde* was lost by perils of the sea, without fault on the part of any one responsible, and the *Hercules* can not now be restored because the German combatant forces themselves destroyed her, purporting to do so as a legitimate act of war. The provision is that a detained vessel is simply to be restored without compensation. Nothing is said to impose on the belligerent any duty to provide for her safety or to effect repairs. If he restores her, he does so without compensation, and meantime she has been detained at her owners' risk. Next, the belligerent is given an express right to requisition, but on condition of paying compensation. Whether requisition has the same meaning in the convention that it has in Order XXIX, or whether, in addition to the

right to use, it includes a right to appropriate, are questions not now material; for present purposes it is sufficient to assume that the meaning of the word in both instruments is the same. While on the one hand nothing is stipulated as to payment of freight or of compensation for the use of the ship while under requisition and nothing is expressed as to repairs, on the other hand, apart from circumstances which discharge the requisitioning government from all the obligations of the convention, the exercise of the right to requisition during detention involves that, if she is not restored at all, compensation takes her place, and for this purpose her money value, when requisitioned, is the obvious substitute for the ship herself in specie.

It is no doubt paradoxical that, the ship having been lawfully requisitioned by the Admiralty without any obligation to pay for using her or for the consequences of mere use, His Majesty's Government should be called on to compensate her German owners, because the German forces have sunk her by an illegitimate act of war. The question, however, is one of construction of the article. It begins by substituting detention for confiscation, thus insuring to the owner the right to get his ship back, so far as the detaining belligerent is concerned. On this is engrafted a proviso for the benefit of the belligerent, of which he may avail himself or not as he pleases, and this proviso imposes on him an unqualified condition—that of compensation. This must be read literally, and as nothing further is prescribed in favor of the detaining belligerent, he can not have the benefit of exceptions by implication. The convention says that requisitioning is to be on condition of paying a compensation; the condition would be frustrated if, though the obligations of the convention had not been terminated, neither ship nor compensation were forthcoming.

The convention furthermore does not define the compensation, or the mode of calculating it, or the time of payment. These are matters which it leaves for subsequent determination, and it is reasonable to infer that at any rate the determination of the court of prize, before which the vessel in question has been duly brought is within the purview of the convention. Accordingly, if the recognized procedure as to requisitioning has been followed, as was done in the present case, and if that

procedure provides for the substitution of money for the ship, that money can not be regarded as being other than the compensation to which the article applies. Under the prize rules and orders the court can allow the ship, which is in the custody of its marshal, to be requisitioned by the Crown, and in the course of such requisitioning to be necessarily exposed to maritime and belligerent hazards. This involves the court's parting with the custody and with the immediate control. For the security of the owner the court may require the deposit or a binding undertaking for the deposit in court of the ship's appraised value, and although the court by no means parts with its control over the ship for all purposes, or precludes itself altogether from ordering her redelivery, it treats the fund for all ordinary purposes as the subject on which subsequent decrees will operate. The advantage to the owner is obvious. This procedure substitutes for such a wasting asset as a ship, which in either event he can not use, a money fund in court, which possesses a relative stability and suffers no wear and tear. Their lordships' conclusion is that under the sixth convention the subjects to be restored are the *Prosper*, being a ship which is in specie, and the appraised values of the *Blonde* and *Hercules*, which were lost. No question as to freight was raised before their lordships.

Conclusion.

A further point may be briefly disposed of. It was that in all cases where a ship is requisitioned otherwise than "temporarily" under rule 6 of Order XXIX, the substitution of the appraised value for the ship is definitive, and no order can thereafter be made to take the ship herself out of the possession of the Admiralty. There is no authority for this. It is not supported by the special provision for a temporary, as distinguished from a general and indeterminate, requisitioning, which was only introduced by amendment into Order XXIX some considerable time after the beginning of the war, nor does the provision that such requisitioning may be without appraisement preclude the power of ordering appraisement, when on the destruction of the vessel it becomes necessary that a fund should be determined which will represent her. It is opposed to the nature of requisitioning, which is for the use of His Majesty (including, no doubt, consumption in the case of goods whose normal use consists in using them up), and would confound a

thing requisitioned for use with a thing acquired for the purpose of sale. Furthermore, in cases where release in specie is the right of a claimant, the court might prove to have disabled itself from making the due decree, if a mere order for leave to requisition were to operate as a final abandonment to the Crown. Apart from the treaty of Versailles, their lordships conclude that the *Prosper* must, as a matter of form, be restored by the Admiralty to the custody of the marshal, in order that she may be released to the owners in specie.

Treaty of Versailles.

The provisions of the treaty of Versailles, which are invoked to the contrary, are twofold. There can be no doubt that Germany was competent, on behalf of those nationals who were German subjects within the operation of the treaty, to make cessions which would bind them and effect a transfer of their rights of property, as if the cession had been made personally by the owner concerned. By article 1 of annex 3 of Part VIII of the treaty Germany ceded to the allied and associated powers all vessels of 1,600 tons gross and upward and a part of those under 1,600 tons, and by paragraph 8 she further "waived all claims of any description against the allied and associated governments or their nationals in respect of the detention, employment, loss or damage of any German ships," with an exception not now material. By article 440 Germany further recognized as valid and binding all decrees and orders concerning German ships and goods made by any prize court of any of the allied and associated powers.

Vessels over 1,600 tons.

In their lordship's opinion, while annex 3 operates to transfer the property in all ships of 1,600 tons gross and upward, it makes no such transfer in the case of ships of less tonnage, at least until they have been selected for surrender as part of those which under the treaty are to be handed over. It is not suggested that the vessels in question have been so selected, and accordingly in their case this provision of the treaty does not affect the owners' rights to restoration in specie. Had they been over 1,600 tons, the property and rights of the owners would have been transferred by the operation of the treaty and they would have had no locus standi to appeal against any order dealing with them or with the money in court or to be brought into court after appraisement in substitution for them. Article 1 of the annex 3 to Part VIII, being a cession by the German Government, "so as to bind all other persons interested," not

only binds the German shipowners as persons interested in appraised values brought into or to be brought into court, but also binds them in respect of their property in the ships, which, until duly divested by a decree having that effect, remains in them, even though it may be liable to be divested at any time; accordingly it would be an answer both in regard to detained ships still in specie, whether remaining in the custody of the court or under requisition, and to the funds, which represent them under the practice of the court.

Their lordships further think that paragraph 8 does not affect the matter. It would be otherwise if the appraised value were regarded, not as a substitution for the requisitioned *res*, taking its place when lost, but as a payment in consideration of being allowed to requisition at all, for in that case there might be a claim, which paragraph 8 would bar. Their lordships, however, reject this view. The owners of these detained ships have no claim against His Majesty's Government either for detaining or for using the vessels. Both were regular proceedings taken as of right under regular decrees the validity of which Germany recognizes by the treaty of peace. The loss of the vessels gave no claim, for the owners' rights arise not out of the loss but out of the substitution of the appraised values for the ships, the release of which is the indemnity which the convention provides for. There is, therefore, in this case nothing to waive.

The treaty of Versailles contains a further provision (art. 297) not specially applicable to shipping by which the allied and associated powers reserve the right to retain and liquidate all property within their territories belonging to German nationals or companies controlled by them at the date of the coming into force of the treaty, the liquidation to be carried out in accordance with the laws of the allied or associated state concerned. It has been urged on the one hand and denied on the other that an answer can be found to the claim of the Danziger Rederci Aktien-Gesellschaft for the release of these vessels in the application of this article to the ships and funds in question. Beyond observing that the contentions raised on both sides deserve full and careful consideration by the appropriate tribunal, their lordships do not feel called upon to express any opinion about them, for they are satisfied that the prize court is not such a

tribunal. Nor do the terms of the armistice affect the matter. It is enough to say that article 30, which was cited, does not purport to touch the obligations of the Crown under the sixth Hague convention, when duly determined by a court of prize, whether before or after the conclusion of hostilities. It merely put it out of the power of Germany, when delivering the ships demanded, to insist on an anticipation of the actual end of the war by delivery of the detained German ships forthwith.

As soon as the conclusion has been arrived at that under the treaty obligations of 1907 this country is bound to restore the *res*, whether now existing in specie or only n the form of a substituted fund, the duty of the prize court prima facie is to give effect to that obligation and thereby to discharge itself and its officials from further custody of or control over it. The decision of course involves a duty to ascertain that the private party claiming is a party presently entitled, who has not, by his own act or by the public act of those who bind him, been divested of his rights of ownership or of possession. Where rights and claims arise out of the way in which the prize has been dealt with prior to the decree for its release and the execution of that decree, no doubt the prize court retains its jurisdiction over them, notwithstanding that the *res* no longer remains in its custody. Here, however, there is no such case. Whatever rights may have been reserved to His Majesty, as one of the allied and associated powers, to liquidate these ships or their value, they have not, so far as their lordships have been informed, been hitherto put in force. The right referred to is not the right, existing independently of and prior to the convention of 1907, to claim condemnation of these ships in prize in accordance with the law of nations, nor is the reservation of it equivalent to the discharge of the restrictions, which the sixth convention imposes. It is a right to liquidate in accordance with municipal law, that is to say a new right, which does not become effective unless and until it is exercised. If this were to be done hereafter, it would be a new act not arising out of dealings with the prize as prize, not modifying the rights of ownership as they now exist, and therefore it would be cognizable by some other tribunal. Their lordships are clearly of opinion that the treaty of Versailles, which neither names

nor seems to consider the sixth Hague convention, does not in this article modify or annul the obligations which arise under it. So much they decide, but no more: the rest is open and, apparently, in accordance with the terms of article 297, is cognizable by the high court of justice. As this potential claim has been brought to their lordships' attention, they think that under any order of release the *res* should not be removed out of British territory for a reasonable time, lest otherwise the treaty right might be defeated; but they see no reason for delaying the grant of a decree for release, since no ground remains for continuing the responsibilities of the prize court or prolonging its possession. The right course will be to release the *res* physically to the public trustee as custodian of enemy property, or to such other officer as may be discharging such duties, to be retained by him for a reasonable time free of expense to the claimants, say for six months, in order that the Crown may have the opportunity of commencing proceedings if so advised, and in that case further until the final determination of those proceedings, but in any other case to be thereafter forthwith delivered up to the claimants.

Effect of article 297.

It is unnecessary to express any opinion as to the appellants' claim to a special position as a company registered in and under the laws of the Free City of Danzig except as to one point. It was urged that a court of prize can condemn only as against an enemy subject. Conceding that the power is exercisable after the conclusion of peace, it was said only to apply to those whose allegiance or citizenship is the same as it was before that time, though peace has converted enmity into amity; hence as against the subject of a newly constituted State, though formerly they were German, the right to condemn has ceased. The contention was not rested on any authority, nor was it explained why proceedings which were regular from the beginning should be frustrated as against the captors by a stipulation in the treaty, which does not deal with their rights but is directed to another and a very different object. Their lordships think the contention groundless.

Decision.

In the result the appeals succeed with costs; the decrees of condemnation should be set aside; the matter should be remitted to the prize court to make such orders as may be necessary for the appraisement of the *Blonde* and the *Hercules*, and to make a decree releasing those

appraised values and the *Prosper* in specie to the custodian of enemy property to be delivered up to the claimants, if after the lapse of six months no proceedings have been begun for an order for delivery up to the Crown, but otherwise to abide the final determination of such proceedings. There is also an appeal by leave from the president's refusal of a rehearing, as to which nothing need be said beyond formally dismissing it.

Their lordships will humbly advise His Majesty accordingly.

Vessels over 1,600 tons.

The *Rabenfels*, the *Werdenfels*, the *Lauterfels*, the *Aenne Rickmers*, the *Gutenfels*, the *Barenfels*, the *Prinz Adalbert*, the *Kronprinsessin Cecilie*.

In these cases their lordships, at various dates in the earlier part of the war, made orders on appeal that the ships should be detained until further order.[22] All were over 1,600 tons.

The owners in the first, second, third, fifth, and sixth now petition that orders be made for the release of such as remain and for payment of the appraised values of such as are lost, while the Crown petitions in all that orders condemning both may be made.

The relevant considerations have been fully dealt with in the case of the *Blonde* and other ships. In the case of ships of this size the treaty of Versailles operates as a transfer of the former owners' rights, nor have they any *locus standi* before the board to discuss how the allied and associated powers may deal with them *inter se*. The petitions for release should be dismissed with costs.

As their lordships understand that His Majesty's Government have come to arrangements with the allied and associated powers with regard to the shipping surrendered and transferred under the treaty, and that no question now arises as between them in relation thereto, they think that the proper course is to discharge the orders for detention previously advised by their lordships; and to release the vessels to the Crown as the present owner.

Their lordships will humbly advise His Majesty accordingly.

Solicitors for shipowners (appellants and on petitions): Botterell & Roche.

Solicitor for procurator general: Treasury solicitor.

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[22] E.g. [1916] 2 A. C. 112; [1918] A. C. 500 and 501*n*.

THE "ZUIDERZEE" AND THE "GOUWZEE"

April 27, 1917

([1] Entscheidungen des Oberprisengerichts in Berlin, 305)

In the prize matter concerning the Dutch steam tugs *Zuiderzee* and the *Gouwzee*, together with four lighters, the imperial superior prize court in Berlin in its session of April 27, 1917, held as follows:

The appeals against the judgment of the prize court in Hamburg of January 26, 1917, fail. The claimants to bear the costs of the appeal.

Reasons:

Statement of the facts.

On September 28, 1916, two tugs, the Dutch tug *Zuiderzee*, with the Belgian lighters, *L'Avenir* and *Pays Bas*, and the Dutch tug *Gouwzee*, with the Dutch lighters *S. C. C. 17* and *S. C. C. 18*, were stopped by German war vessels and brought into Zebrugge. The lighters were empty. The Belgian craft were turned over to the Marine Corps in Bruges in accordance with article 46, section 2, of the Price Court Rules. The form of the barges, which were being taken to London, is the distinct build of the "Thames barges" as they are used in London Harbor.

In response to the published notice of the imperial prize court in Hamburg, the following appearances were made for the release of the vessels and indemnification:

1. The firm of L. Smit & Co., as owners, for the two steam tugs.

2. The merchant, L. Letzer, formerly of Antwerp, now of Rotterdam, for the Belgian lighter.

3. The Scheepvart en Steenkalen Co., of Rotterdam, for the Dutch lighter.

The imperial prize court in Hamburg decreed the condemnation of all the craft and rejected the claims.

Against this decision the claimants have entered appeal.

The appeals fail.

Barges as "contraband."

The barges captured with the two steam tugs are conditional contraband according to article 23, section 9, of the Prize Code. Their destination was London, and the judge of first instance is of the opinion that the presumption of their destination for the enemy Government or military force arising therefrom has not been disproved. On this ground he reached the conclusion that not only the barges themselves but the tugs as well were liable to condemnation. It is explained that the barges were the

only "consignment" (Beförderungsgegenstände) of the tugs, and were to be considered as their "cargo" in the sense of article 41, section 2, of the Prize Code. That they were not taken on board the steamer made no difference. According to the aim of the prize law, which is to prevent the "supply" of contraband to the enemy, that does not matter. If certain provisions of the Prize Code read as if the goods must be on board the vessels, like articles 35 and 36, there are other provisions again which plainly denote that only the act of supplying is the criterion, as articles 39 and 41.

The fact that it would be absurd to treat a vessel which, for instance, was carrying parts of a submarine or dock on board differently from a vessel which was conveying an entire boat or dock in tow to the enemy was considered telling.

That must be concurred in. Under the circumstances here prevailing, where the barges were themselves unladen, the legal question is not in doubt. According to the statements of the claimants, it is established that the barges were given over to the owners of the tugs for delivery. According to a generally recognized principle of private law, this is the decisive element in establishing the legal position of tows. According to whether the towed vessel has been intrusted to the master of the tug for delivery to the recipient, or whether title has remained in the owners of the former, a contract of freight, or a contract of towage, is presented, be it for service or for work. Even granted that principles of private law are not necessarily controlling for questions of international law, yet in this case they have immediate significance, inasmuch as the answer to the question of what was to be considered as the cargo of the vessel can only be gathered from the agreement concerning the goods made with the owner of the vessel, which must be interpreted in accordance with private law. It is unnecessary to raise the question whether it would be different if goods had been taken aboard the lighters for delivery to England at the same time, and if there had been the further intention of bringing the barges right back to Holland after the completion of the trip and unloading.

Contract for towage.

Here it is only a question of the conveyance of the barges themselves, which comprised the only elements of the consignment. It is immaterial whether the ship's

master stows the goods intrusted to him in the hold or on deck, whether he suspends them from the sides of the vessel, or whether he draws them along after him or beside him through the water.

From the point of view of international law, the barges were the goods and the cargo of the tug. Nor does the application of article 41, section 2, of the Prize Code do violence to the text. The tugs are subject to condemnation in so far as the towed craft were contraband, because they were captured for "carriage" of contraband. On the other hand, article 33, section 2, of the Prize Code has no application to the towed craft. It provides that merchant vessels themselves are not to be regarded as destined for the enemy forces, etc., for the mere reason that they are en route to a fortified position of the enemy. But the towed barges are not in this case the "vessels themselves," but the "cargo." From still another point of view, but for the same reasons, as regards the lighters *L'Avenir* and *Pays Bas*, it is not of decisive significance that they are of Belgian, and hence of enemy, nationality. For they are cargo, and enemy cargo is protected by the neutral flag of the tug, provided it is [not] contraband of war.

German Prize Code.

Concerning this last question, too, the first judge must be concurred with. The legal presumption of enemy destination arises against the lighters in view of the place to which they were bound, and what the merchant Letzer—to consider his claim next—has adduced in disproof of the presumption is without significance. The assurances of the owners of the craft in litigation can naturally pretend to only slight value as evidence. Nor are the officials of the firm so disinterested that their impartiality and trustworthiness are to be presupposed without further ado. Inherently, too, their declarations—including that which the claimant succeeded in substantiating under No. 1—are futile, so far as ascribing to them any decisive value as evidence is concerned. In vain does one ask what induced the merchant, formerly domiciled in Antwerp, who now seems to have sought refuge in Rotterdam, to transfer his business, or a part thereof, to London. And even if the assumption is doubtless in point, that at present there is much to be earned in London with craft of this kind, yet it is equally sure that the English military direction or the departments of civil government of the state stand in the first rank as the best customers for means of transportation by

Presumption of enemy destination.

water. If the actual facts remain unclear, even in regard to what the claimant had only contemplated, it is wholly uncertain what the real state of affairs would have been if the voyage of the lighters had succeeded. Therefore, the legal presumption remains.

Claim of Dutch Shipping & Coal Co.

Fundamentally, it is the same with the claim of the Dutch Shipping & Coal Co. They appear to have an establishment in London in connection with their firm which was transferred to England, and the lighters might have been going to play their part in a business already existing—one does not know, to be sure, how long it had existed—of a definite character with business connections which had been established earlier. Here, too, however, from what the claimant presents in the way of proof, one gains no more than this general idea of the possibilities presented. Nor can any conclusive weight be given the fact that the transfer of the lighters to England was only permitted by the Government upon the pledge of the owners to bring them home again within six months, and after the English Government had guaranteed that no objection would be raised thereto. On this point the testimony is rendered nugatory by the evidence. Only two, quite detached, statements in writing were presented in transcript.

If one is confronted at this stage by facts which are fragmentary and which have not been cleared up, there also fails to be any assurance that the pledges entered into at the time of the transfer would have been kept on all sides. The embarrassment of our enemy, as regards tonnage of all kind, is too well known for one not to have to consider the possibility that, with the consent of all parties, and without any embarrassment arising for the claimant *vis-à-vis* his government, the arrangement might have been changed, as may even have been intended when the vessels were imported.

The case of craft of the sort in question, under the prevailing circumstances, is one *sui generis*, and it can not be decided according to the same rules which apply to goods of other kinds, food, etc.

Condemnation affirmed.

It is also remarkable that in the assurances of those who know from their own knowledge, only use for purposes of *war* is spoken of. Use by departments of the English Government for other purposes, even limited to the proposed period of six months, would be conclusive as to the contraband character of the vessels.

The judgment is *affirmed*.

JAPANESE PRIZE CASES

THE GERMAN STEAMSHIP "ZUIMO" AND ITS CARGO

Nov. 21, 1914, March 29, 1915

(Japanese supreme prize court and prize court at Sasebo)

Decision, concerning the case of the seizure of the German steamship *Zuimo* and its cargo in the supreme prize court and the prize court at Sasebo.

A

Concerning the case of the seizure of the German steamship *Zuimo* and its cargo, the prize court at Sasebo rendered the decision on the 21st day of November of the third year of Taisho (A. D. 1914) as follows:

Decision

Petitioner: Hamburg-Amerikanische Packetfahrt Actiengesellschaft, of Hamburg, Germany.

Representative: George Bohlsen, Hamburg-American Line, Shanghai, China.

Deputy: Robert Copus, Kitanomachi, Kobe.

Counsellor for petitioner: Jōei Hirata, counsellor at law.

Judgment of Sasebo prize court.

The prize court at Sasebo renders the decision concerning the case of the seizure of the German steamship *Zuimo* and its cargo, as follows:

TEXT

The German steamship *Zuimo* and its cargo on board, consisting of 600 tons of Miike coal, 900 tons of Cardiff coal, 60 barrels of machine oil, and 3 cases of medical supplies shall be condemned as prize.

FACTS AND REASONS

Statement of fact.

The steamship *Zuimo* is owned by the Hamburg-American Steamship Co. of Germany, registered at Hamburg, Germany, having its seat at Shanghai, China, and is a merchantman solely engaged in transportation of goods, under the German flag.

When the war broke out between Germany, on one hand, and Russia, France, and Great Britain, on the other, in the early period of August, the third year of Taisho (A. D. 1914) the ship was laden at Shanghai, by the order of the said steamship company, with 600 tons of Miike coal, 900 tons of Cardiff coal, 60 barrels of machine oil, and 3 cases of medical supplies, all of which belonged to the same company.

The ship left Shanghai on the 7th of that month in order to supply the German fleet which was cruising in the southern Pacific, though feigning to be heading toward Kobe, Japan, as its destination; and reached, after direct voyage, on August 14, the Pagan Island, of German possession, where it stayed at anchorage or in cruising around there. On the 23d day of that month the war broke out between this country and Germany, but the ship remained in the same condition until September 7, when it sailed farther south to the Saipan Island, of German possession, where it stayed for several days in a port of the island named Tanapag. Thus it expected to furnish the German fleet with the supplies on board. But, as it had no opportunity as yet in meeting the said fleet, it decided to sail for the "disguising" destination in order to supplement foodstuffs. Leaving the port Tanapag of the said Saipan Island on September 8, it made a stop at the Pagan Island, after which it sailed on toward Kobe.

It was about 2 o'clock in the morning of the 15th day of September when the said ship with its cargo was captured at sea by the *Hatsuharu*, a destroyer of the Imperial Japanese Navy, at about 400 meters north of Tomogashuna of the Kidan-Strait.

The above facts were clearly established by the report of the acting commander, Bunichi Harada, of the destroyer *Hatsuharu*, lieutenant of the Imperial Japanese Navy; by the statements made by Capt. Fritz von Bilgrim of the steamship *Zuimo*, Chief Mate Johann Nansch, and one of the crew, a Li Yao Cheng; by the report of the examination of the log book provided in the said ship; by the nature of the cargo itself; and also by the incompleteness of the records related to the ship.

Argument for plaintiff.

The points maintained by the counsellor for the petitioners are as follows: That the steamship *Zuimo* and its cargo on board are altogether possessed by the petitioners; that since the ship was entirely ignorant of the

outbreak of the war between Japan and Germany until it was captured on September 15 at the Kidan-Strait, after leaving Shanghai, as its "last starting port," release of the ship should be made by virtue of the imperial ordinance No. 163, article 5; that the fact that the ship made temporary anchorages at the Pagan and Saipan Islands amounts to no more than that it cast anchor at the "no-man's island of an unknown sea"; it should not, therefore, be considered in its later relationships as its "last starting port" or the so-called "the national port of the ship" or "the neutral port" as is mentioned in the last section of the said article; that, as the ship is solely used for the regional, limited navigation, it should be released, together with its cargo, by virtue of the naval order No. 8, article 25, and that, since the cargo was not carried with the view of belligerent purposes, the ship and its cargo on board should be released.

Argument of condemnation.

On the other hand, the public procurator of the prize court maintains, in brief, that the ship and its cargo should be seized because they are clearly "enemy ship and enemy cargo," and, furthermore, they do not come under the provisions which are provided for special exemption.

Capture of private property at sea.

This court is of opinion that at the present generation the precedents and established rules of the international law justly recognize the right of a belligerent power to seize any enemy ship and enemy goods on the sea in time of war, except those which are exempted by virtue of international law, or those which come under the provisions specifically providing for such exemption between the participating belligerents; and our laws and regulations concerning the maritime capture are nothing but the adoption of these principles.

Ignorance of hostilities.

Now as to this case, it is the opinion of this court that there is scarcely any doubt about the enemy character of the ship and cargo, for the steamship *Zuimo* is justly entitled to fly the German flag, and the cargo on board is possessed by a company of German nationality. The imperial ordinance No. 163, article 5, section 1, of the third year of Taisho (A. D. 1914) should be interpreted as being without applicability to a ship which, though ignorant of the fact of the existence of war, sailed from its last port after the outbreak of war. It can not be denied that the ship was at anchor at Tanapag Harbor of the Saipan Island of German possession after the declara-

tion of the war between Japan and Germany, and did not leave there until September 8, making it clear that Shanghai, its port before the declaration of war, was nothing but its very first starting port. Consequently, the provision of article 5, section 1, should not be applied in this case. Obviously, neither section 3 of the same article, nor the same imperial ordinance, nor any other exceptions, providing for exemption, should be applied.

Exemption of small boats.

Furthermore, the so-called "enemy ships engaged in the regional, limited navigation" mentioned in the naval order No. 8, article 25, of the third year of Taisho (A. D. 1914), should be interpreted so as to mean nothing more than the small craft engaged in shipping of the marine and agricultural products, and in general transportation with and among the neighboring islands; no steamship engaged in the coastal navigation should be included. It is clear that the ship under consideration belongs to a powerful German joint-stock company, tonnage being about 1,903, engaged always in the transportation of goods, navigating along the Yangtse River and the far eastern coast, with Shanghai as its base. It does not, therefore, come under the rules providing for exemption. It should also be considered that the ship did sail with the definite purpose of furnishing the supplies to the German fleet which was cruising in the southern Pacific at that particular time. However, it is quite a useless task to inquire whether it did so for belligerent purposes or not, since they have already been decided to be "enemy ship and enemy goods."

Decision.

Such being the case, it is the opinion of the court that the seizure of the said steamship and cargo on board is justifiable and they ought to be condemned as stated in the text.

At the prize court at Sasebo the 21st day of November of the third year of Taisho (A. D. 1914).

Decision rendered in the presence of Matsukichi Koyama, public procurator.

Taro Tezuka, president, the prize court at Sasebo; Shizen Komaki, counsellor, the prize court at Sasebo; Tsutsumu Hirose, counsellor, the prize court at Sasebo; Sadayoshi Asaki, secretary, the prize court at Sasebo.

B

Upon appeal from the above decision the supreme prize court has rendered its decision on the 29th day of last month (March 29, 1915) as follows: Appeal.

DECISION

Petitioner: Hamburg-Amerikanische Packetfahrt Actiengesellschaft, of Hamburg, Germany.

Representative: George Bohlsen, Hamburg-American Line, Shanghai, China.

Deputy: Robert Copus, Kitanomachi, Kobe.

Counsellor for petitioner: Jōei Hirata, counsellor at law.

The supreme prize court considers, in the presence of the procurators, Hideyoshi Arimatsu and Kisaburo Suzuki, J. D., the appeal from a decision of the prize court at Sasebo rendered on the 21st day of November of the third year of Taisho (A. D. 1914), which authorized the condemnation of the German steamship *Zuimo* and its cargo consisting of 600 tons of Miike coal, 900 tons of Cardiff coal, 60 barrels of machine oil, and 3 cases of medical supplies, all of which were captured at sea by the *Hatsuharu*, of the Imperial Japanese Navy, on the 15th day of September of the third year of Tashio (A. D. 1914), at about 400 meters north of Tomogashima at the Kidan Strait; the appeal being made by the petitioner Hamburg-Amerikanische Packetfahrt Actiengesellschaft; representative George Bohlsen, Deputy Robert Copus, and his counsellor, Jōei Hirata, counsellor at law.

The points of the protest presented by Jōei Hirata, counsellor for the petitioners, can be summarized as follows: Argument for plaintiffs.

That the captain and the crew of the ship were entirely ignorant of the outbreak of the war between Japan and Germany until they were captured;

That the cargo was not transported for any belligerent purpose;

That the ship should be released by virtue of the imperial ordinance No. 163, article 5, of the third year of Taisho (A. D. 1914), because it put to sea from its last starting port of Shanghai without any knowledge of the existence of war between Japan and Germany;

That the fact that the ship made temporary anchorages at the Pagan and Saipan Islands amounts to no more

than that it cast anchor at "a no-man's island of an unknown sea," it should not, therefore, be considered in its later relationships, as its "last starting port," as stated in the imperial ordinance No. 5, article 1, or "the national port of the ship" or "the neutral port," as is mentioned in section 3 of the same article;

That, as the ship has solely been used for the regional, limited navigation, it should be released, together with its cargo, by virtue of the naval order No. 8, article 25;

That, for these reasons, it is urged the steamship *Zuimo* and its entire cargo on board should be released, reversing the original decision.

Argument for condemnation.

On the other hand, Matsukichi Koyama, procurator of the prize court at Sasebo, maintains:

That the ship under consideration belongs to the enemy and the cargo on board is "enemy goods on an enemy ship;" it is therefore clear that even the appellant does not dispute this point;

That the enemy ship may be exempted from capture at the time of outbreak of war only when it comes under the rules of the exemption expressly declared by the belligerent power; the simple fact that it lacks the knowledge of the outbreak of war does not itself exempt it from seizure;

That even admitting what the appellant contends that the captain and his crew were ignorant of the outbreak of the war, attention must be called to the fact that there is no provision in the imperial ordinance No. 163 of the third year of Taisho which relates to a ship like this one that left the Saipan Island of German possession after the outbreak of war between this country and Germany, namely, on September 8;

Enemy destination.

That as to the belligerent purpose of the transportation, there is no room for doubt when we come to consider the following facts: first, the cargo was war supplies; secondly, there were two German warships (*Scharnhorst* and *Gneisenau*) cruising in the southern Pacific at that particular time;

Thirdly, the fact that the captain, leaving the Pagan Island for the Saipan, left two letters in the charge of the administrator of the said island, which were very likely addressed to the captains of the German warships. But it is immaterial to investigate whether or not the ship transported the cargo for belligerent purposes, since it is enough to condemn it as prize when they are proved to be "enemy ship and enemy cargo";

That it is clear that Shanghai was its first port departure and the Saipan Island was its last port of departure—this can be established judging from the fact that it was laden at Shanghai with coal and other war supplies for the German fleet of the southern Pacific—then sailing for the Pagan Island on August 7 where it cruised about three weeks around there, but failing to meet the fleet moved to the Saipan Island on September 4, where it remained until the 8th, when it decided to sail for Kobe in order to supplement the foodstuffs;

Saipan as a port.

That the Saipan can not be considered as "a no-man's island of an unknown sea"; because, according to the statements made by the first mate, Johann Hansch, and by Elbert Rosche, a passenger from the Saipan Island, there is Lau-Lau Bay in the east of Saipan, and in the west of Tanapag Harbor there are some habitations counting 2,400 natives, 15 Germans, and 8 Japanese; and not only that, but the map shows there is a harbor in the Tanapag Bay which bears the same name.

That, as stated in the original paper of decision, it is clear that the ship is not the "enemy ship used in the regional, limited navigation," within the meaning of the naval order No. 25 of the third year of Taisho (A. D. 1914).

That in the whole view of the case it is proper that the original court condemned the ship and its cargo; and since there is no foundation for claim, it should be dismissed.

Judgment.

The following is the opinion of this court:

Enemy vessel and cargo.

That, since there is no dispute as to the right of the ship in flying the German flag, since its cargo on board belongs to a German trading company, and since the ship and its cargo are of enemy character, there is no question about the condemnation even though the cargo were not for belligerent use;

That the exemption of such ship and cargo can be made only when they fulfilled the conditions provided by the express terms of the treaty No. 11 of the forty-fifth year of Meiiji, the imperial ordinance No. 163, of the third year of Tiasho, or the naval order No. 8 of the same year. Nevertheless, the fact that the ship set sail from Tanapag Harbor of the Saipan Island of German possession, on the 8th day of the third year of Taisho, which is proved by the log book of the ship and other documents, can not be denied. Therefore, the ship does

not come under the provision of the so-called "Imperial German ships which left their last starting port before the outbreak of war," of the imperial ordinance No. 163, article 5, of the third year of Taisho.

Port of departure.

It is clear, therefore, that they can not be exempted from seizure by virtue of the said provision, even though we accept the fact that the crews were ignorant of the outbreak of the war.

Though the appellant urges that the ship left its last starting port of Shanghai on the 7th day of August, of the third year of Taisho, and that its temporary anchorages at the Pagan and Saipan Islands are nothing more than its stoppages at "the no-man's island of an unknown sea," the logbook and other documents clearly show that it stayed for several days at Tanapag Harbor, and sent a second engineer ashore for medical treatment, while loading with some foodstuffs and taking a passenger aboard. Therefore, it can not be considered an anchorage at "the no-man's island of an unknown sea."

The so-called "last starting port," provided in the said imperial order No. 5, does not mean the base of the starting port of a voyage, but it simply means the last port during its navigation. This can be clearly seen in the cause of its origin, the treaty No. 6 of the forty-fifth year of Meiji, article 3. Therefore, the protest against this point has no foundation.

Local traffic.

Again, it can not be denied that the ship, possessing a tonnage of 1,903, was engaged in navigation for transportation of goods along the Yangtse River and the far eastern coast, with Shanghai as its base; this is proved by the builder's certificate of the S. S. *Zuimo* and other documents, and by the actual fact that the ship made voyages from Shanghai to Kobe. Therefore, the ship does not come under the provision "the enemy ship used for regional, limited navigation" of the naval order No. 8, article 25, of the third year of Taisho. Therefore, it can not be released by virtue of the said provision.

The so-called "enemy ships used in the regional-limited navigation" means simply those small craft used for the coastal transportation of a limited area; and this is clearly shown in the cause of the enactment of the treaty No. 11 of the forty-fifth year of Meiji. Again, therefore, this point has no foundation.

As stated above, there is no ground for appeal.

The court, therefore, is of opinion that the appeal should be dismissed.

At the supreme prize court, the 29th day of March of the fourth year of Taisho (A. D. 1915).

Baron Junjiro Hosokawa, Litt. D., president, the supreme prize court; Baron Koroku Tsutsuki, J. D. counsellor, the supreme prize court; Genji Baba, counsellor, the supreme prize court; Joichiro Tsuru; counsellor, the supreme prize court; Hideo Yokota, J. D. counsellor, the supreme prize court; Kajkuichi Murakamu, counsellor, the supreme prize court; Sakuei Takahashi, J. D. counsellor, the supreme prize court; Jujiro Sakata, counsellor, the supreme prize court; Chōzo Koike, counsellor, the supreme prize court; Mayuki Akiyama, counsellor, the supreme prize court; Jōji Matsumoto, J. D. counsellor, the supreme prize court.

THE SEIZURE AND DESTRUCTION OF THE GERMAN SAILING VESSEL "EORUS"

Jan. 9, 1915

(Prize court at Sasebo)

Decision

Examining the statement of the procurator concerning the seizure of the German sailing vessel *Eorus*, the court renders the decision as follows:

The sailing vessel *Eorus* is decreed seized.

FACTS AND REASONS

Statement of fact.

The sailing vessel under our consideration is a possession of a Yaluit Joint-stock Co. of Hamburg, Germany, registered at Hamburg. Under German flag, the ship engaged in the transportation of goods among the islands of the southern Pacific.

When the state of war was established between this country and Germany on the 23d day of August of the third year of Taisho (A. D. 1914), the ship sailed, without cargo, from the Yaruit Island, of the German Marshall Archipelago, for Honolulu, of the Hawaiian Islands of the United States, apparently in order to avoid capture in a neutral port. It was when the ship was passing a point on the sea on a course 75° west of north near the Diamond Head lighthouse, about 21° 12′ 30″

north latitude; and 157° 55′ 30″ west longitude, on October 24 of the same year, that she was captured by the H. I. S. *Hizen*, which sent her to the bottom at a point 7.5 miles southwest of the lighthouse (that is, 7.5 miles from the coast), at 8.09 p. m. (Honolulu standard time), of the same day.

The above fact is well established by the document called "Captain's statement," the list of crew, the log book, the certificate of the nationality of the ship, a letter of Jansen Menke, of the branch office of the Yaluit Co., dated September 9, 1914, addressed to Harhachfeldt & Co. another letter of the same person, dated September 3, 1914, addressed to the base of the German Asiatic Fleet, the joint report by Lieut. Bikei Imaizumi and Capt. C. Friedricksen on the seizure, and the report of Capt. Yasukata Kawanami, commander of the H. I. S. *Hizen*.

Destruction of prize.

The court is of opinion that a belligerent power can capture any enemy merchantman which navigates in the public sea, knowing the outbreak of war; and it is also a well-established rule of the international law, recognized by the theory and precedents, that the captor can destroy the prize in case it hinders the military action to take the captured ship into the captor's port.

Therefore, we are inclined to justify the action of the H. I. S. *Hizen* which captured the enemy ship as such when the latter was sailing toward Honolulu in order to avoid capture.

According to the statement made by Commander Kawanami of the H. I. S. *Hizen*, his warship was watching the German warship *Geier* which was sheltering itself in the port of Honolulu, and it was also preventing the northward movement of the powerful enemy fleet. Under these circumstances, it is quite obvious that the effect of the military action might have been hindered, if they transported the prize; therefore it is also lawful that they destroyed it.

Hence, the court decrees as stated in the text.

At the prize court at Sasebo, the 9th day of January of the fourth year of Taisho (A. D. 1915).

Taro Tezuka, president, the prize court at Sasebo; Fushi Inuru, counsellor, the prize court at Sasebo; Otojiro Ito, counsellor, the prize court at Sasebo; Terufusa Hori, counsellor, the prize court at Sasebo; Shunichi Nagaoka, J. D., counsellor the prize court at Sasebo; Yuichiro Kuma, secretary, the prize court at Sasebo.

THE SEIZURE OF THE NORWEGIAN STEAMSHIP "CHRISTIAN BOLES" AND ITS CARGO

(Prize court at Sasebo)

Decision

Examining the statement of the procurator concerning the seizure of the Norwegian steamship *Christian Boles* and its cargo, the court renders the decision as follows:

TEXT

The steamship and its cargo on board should be released.

FACTS AND REASONS

Statement of fact.

The steamship under our consideration is a merchantman belonging to a Christian Boles Co. of Norway, and is registered at Bergen, Norway. Under the Norwegian flag, it has been engaged in transportation of goods. The said company has rented it to the J. J. Moore Co., of San Francisco, United States of America, which in turn rented the same to the Robert Dollar Co., of San Francisco, United States of America. Under that contract, the ship has been engaged in navigation between Shanghai, China, and the Pacific ports of the United States.

On the 27th day of January of the fourth year of Taisho (A. D. 1915) the ship put to sea from Shanghai for San Pedro, United States of America, laden with cotton oil, cowhides, eggs, poppy seeds, wool, pig iron, and other commodities. It carried aboard a passenger, one G. Blumenstock, a reserve surgeon of the German Army, who assumed a Swiss name of L. Belnasconie, under the status of supercargo.

Unneutral service.

Arriving at Kobe, via Karatsu, Japan, on February 1, and being laden with corn and other goods, the ship was searched by the H. I. S. *Tatsuta*, and on the 5th of the same month it was declared seized on the grounds that the ship had aboard a man who most likely could help the military affairs against our country; that the captain's statement did not agree with the log book of the ship; and that the log book was disarranged.

The above facts are clearly established by the report of the acting commander, Saisuke Koizumi, H. I. J. N., lieutenant of the H. I. S. *Tatsuta*, the examinations of Capt. J. Hiller, the crew, and G. Blumenstock, the certificate of nationality of the ship, the certificate of registration of the ship, the list of crew, the charter party, the log book, the inventory, and the bill of lading.

The procurator urges that the capture of the said steamship was lawful, but that the ship and its cargo should be released immediately.

The court is of opinion that the captain did not present all the lists of crew when searched; and even those presented later do not coincide with the actual staff; moreover, the records are disarranged; and the captain's statement differs from the list of crew.

It was clearly learned by the dispatch from our consul general at Shanghai to the commander of the H. I. S. *Tatsuta* that one L. Belnasconie of Switzerland, registered in the list of crew as a supercargo has been dead for some four months. Again it is plain fact that the very ship secretly carried Von Hinsze, the German minister to China, under the false name of W. Rogers when it sailed on December 5, 1914, from Everett, United States of America, to Shanghai.

Under these circumstances, and judging from this man's conduct it is quite natural that the acting commander of the H. I. S. *Tatsuta* suspected him as a German officer in command of the ship in behalf of Germany for her military aim.

Therefore, we consider that the capture of the ship and its cargo was lawful.

Suspicion not well founded.

Despite all these facts it is the opinion of this court that the ship and its cargo should be released immediately on the following grounds:

Because the difference in the registered and actual number of the crew was only due to the fact that some of the crew went ashore at Karatsu on January 30—this fact was not reported to the searching officers:

Because the person who assumed the name Belnasconie was really a German surgeon, a reserve German Army surgeon, who had been practicing medicine in Shanghai, and was returning home in order to join the military force of his country, and traveled under a false name in order to avoid detention by the British authorities but was not commanding the ship for belligerent purposes; and,

Vessel restored.

Because the cargo on board is not contraband of war.

We decide, therefore, as stated in the text. At the prize court at Sasebo, the 26th day of February of the fourth year of Taisho (A. D. 1915).

Taro Tezuka, president, the prize court at Sasebo; Fushi Inuru, counsellor, the prize court at Sasebo; Thunichi Nagaska, J. D., counsellor, the prize court at Sasebo; Kai Matsuoka, counsellor, the prize court at Sasebo; On Hirose, counsellor, the prize court at Sasebo; Katsuji Kitamura, secretary, the prize court at Sasebo.

MIXED CLAIMS COMMISSION—UNITED STATES AND GERMANY

OPINION IN THE "LUSITANIA" CASES

November 1, 1923

(Mixed Claims Commission, United States and Germany, p. 17)

PARKER, *Umpire*, delivered the opinion of the commission, the American and German commissioners concurring in the conclusions:

Statement of case.

These cases grow out of the sinking of the British ocean liner *Lusitania*, which was torpedoed by a German submarine off the coast of Ireland May 7, 1915, during the period of American neutrality. Of the 197 American citizens aboard the *Lusitania* at that time, 69 were saved and 128 lost. The circumstances of the sinking are known to all the world, and as liability for losses sustained by American nationals was assumed by the Government of Germany through its note of February 4, 1916, it would serve no useful purpose to rehearse them here.

Rules of commission.

Applying the rules laid down in Administrative Decisions Nos. I and II handed down this date,[1] the commission finds that Germany is financially obligated to pay to the United States all losses suffered by American nationals, stated in terms of dollars, where the claims therefor have continued in American ownership, which losses have resulted from death or from personal injury or from loss of, or damage to, property sustained in the sinking of the *Lusitania*.

This finding disposes of this group of claims, save that there remain to be considered (1) issues involving the nationality of each claimant affecting the commission's jurisdiction, and (2) the measure of damages to be applied to the facts of each case.

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[1] Reference is made to Administrative Decision No. I for the definition of the terms used herein.

We are here dealing with a group of cases all growing out of a single catastrophe. As it is manifestly of paramount importance that the same rules of decision shall govern the disposition of each and all of them, whether disposed of by agreement between the two commissioners or in the event of their disagreement by the umpire, this opinion announcing such rules is, at the request of the two commissioners, prepared by the umpire, both commissioners concurring in the conclusions. The principles and rules here laid down will, where applicable, govern the American and German agents and their respective counsel in the preparation and presentation of all claims.

In this decision rules applicable to the measure of damages in *death cases* will be considered. In formulating such rules and determining the weight to be given to the decisions of courts and tribunals dealing with this subject, it is important to bear in mind the basis of recovery in death cases in the jurisdictions announcing such decisions.

At common law there existed no cause of action for damages caused by the death of a human being. The right to maintain such actions has, however, been long conferred by statutes enacted by Great Britain and by all of the American States. The German code expressly recognizes liability for the taking of life.[2] These legislative enactments vary in their terms to such an extent that there can not be evolved from them and the decisions of the courts construing them any composite uniform rules governing this branch of the law. Such statutes and decisions as well as the other governing principles set out in this commission's Administrative Decision No. II will, however, be considered in determining the applicable rules governing the measuring of damages in death cases.

Damages.

The statutes enacted in common-law jurisdictions conferring a cause of action in death cases where none before existed have frequently limited by restrictive terms the rules for measuring damages in such cases. The tendency, however, of both statutes and decisions is to give such elasticity to these restrictive rules as to enable courts and juries in applying them to the facts of each particular case to award full and fair compensation for the injury suffered and the loss sustained.[3] The statutes of several States of the American Union authorize juries to award such damages as are "fair and just" or "proportionate to the injury." Under such statutes the decisions of the courts give to the juries much broader latitude in assessing damages than those of other States

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[2] Section 823. See also Huebner's "History of Germanic Private Law," 1918, pp. 578–579, and Schuster's "Principles of German Civil Law," 1907, secs. 284–286.

[3] *Nohrden* v. *Northeastern Railroad Co.*, 1900, 59 South Carolina Reports 87, 105–108, 37 Southeastern Reporter 228, 238–240; *Stuckey* v. *Atlantic Coast Line Railroad Co.*, 1901, 60 South Carolina Reports 237, 252–253; *Parker* v. *Crowell & Spencer Lumber Co.*, 1905, 115 Louisiana Reports 463, 468, 39 Southern Reporter 445, 446; *Bourg* v. *Brownell-Drews Lumber Co.*, 1908, 120 Louisiana Reports 1009, 1022–1027, 45 Southern Reporter 972, 977–979; *Seaboard Airline Railway* v. *Moseley*, 1910, 60 Florida Reports 186, 189; *Peters* v. *Southern Pacific Co.*, 1911, 160 California Reports 48, 69–71; *Underwood* v. *Gulf Refining Co.*, 1911, 128 Louisiana Reports 968, 937–1003, 55 Southern Reporter 641, 646–653; *Johnson* v. *Industrial Lumber Co.*, 1912, 131 Louisiana Reports 897, 910, 60 Southern Reporter 608, 612.

where the statutes expressly limit them to so-called "pecuniary injuries," [4] which is a term much misunderstood.

In most of the jurisdictions where the civil law is administered and where the right of action for injuries resulting in death has long existed independent of any code or statute containing restrictions on rules for measuring damages, the courts have not been hampered in so formulating such rules and adapting them to the facts of each case as to give complete compensation for the loss sustained.

It is a general rule of both the civil and common law that every invasion of private right imports an injury and that for every such injury the law gives a remedy. Speaking generally, that remedy must be commensurate with the injury received. It is variously expressed as "compensation," "reparation," "indemnity," "recompense," and is measured by pecuniary standards, because, says Grotius,[5] "money is the common measure of valuable things."

In death cases the right of action is for the loss sustained by the *claimants*, not by the estate. The basis of damages is, not the physical or mental suffering of deceased or his loss or the loss to his estate, but the losses resulting to claimants from his death. The inquiry then is: What amount will compensate claimants for such losses?

Bearing in mind that we are not concerned with any problems involving the punishment of a wrongdoer but only with the naked question of fixing the amount which

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[4] *Mynning* v. *The Detroit, Lansing & Northern Railroad Co.*, 1886, 59 Michigan Reports 257, 261–262, 26 Northwestern Reporter 514, 516–517; *Simmons* v. *Mc Connell*, 1890, 86 Virginia Reports 494, 496–497, 10 Southeastern Reporter 838, 839; *The Ohio and Mississippi Railway Co.* v. *Wangelin*, 1894, 152 Illinois Reports 138, 142, 38 Northeastern Reporter 760, 761; *Turner* v. *Norfolk & W. R. Co.*, 1895, 40 West Virginia Reports 675, 638–689, 693–695, 22 Southeastern Reporter 83, 87, 9; *Strother* v. *South Carolina & Georgia Railroad Co.*, 1896, 47 South Carolina Reports 375, 383–384, 25 Southeastern Reporter 272, 274; *Mason* v. *Southern Railway Co.*, 1900, 58 South Carolina Reports 70, 77, 36 Southeastern Reporter 440, 442; *Parker* v. *Crowell & Spencer Lumber Co.*, 1905, 115 Louisiana Reports 463, 468, 39 Southern Reporter 445, 446; *Norfolk & Western Railway Co.* v. *Cheatwood's Administratrix*, 1905, 103 Virginia Reports 356, 364–365, 49 Southeastern Reporter 489, 491–492; *Butte Electric Ry. Co.* v. *Jones*, 1908, C. C. A., 164 Federal Reporter 308, 311, 18 Lawyers' Reports Annotated (New Series) 1205, 1208; *Brennen* v. *Chicago & Carterville Coal Co.*, 1909, 147 Illinois Appellate Court Reports 263, 270–273; *Chesapeake & O. Ry. Co.* v. *Hawkins* (West Virginia), 1909, C. C. A., 174 Federal Reporter 597, 601–602, 98 Circuit Court of Appeals 443, 447–448.

[5] "The Rights of War and Peace," by Hugo Grotius, Whewell translation, 1853 (hereinafter cited as "Grotius"), Book II, Ch. XVII, Sec. XXII; Sedgwick on Damages, 9th (1912) edition (hereinafter cited as "Sedgwick"), Sec. 30.

Bases of estimate.

will compensate for the wrong done, our formula expressed in general terms for reaching that end is: Estimate the amounts (*a*) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (*b*) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision, and also add (*c*) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as claimant may actually have sustained by reason of such death. The sum of these estimates, reduced to its present cash value, will generally represent the loss sustained by claimant.

In making such estimates there will be considered, among other factors, the following:

(*a*) The age, sex, health, condition and station in life, occupation, habits of industry and sobriety, mental and physical capacity, frugality, earning capacity and customary earnings of the deceased and the uses made of such earnings by him:

(*b*) The probable duration of the life of deceased but for the fatal injury, in arriving at which standard life-expectancy tables and all other pertinent evidence offered will be considered;

(*c*) The reasonable probability that the earning capacity of deceased, had he lived, would either have increased or decreased;

(*d*) The age, sex, health, condition and station in life, and probable life expectancy of each of the claimants;

(*e*) The extent to which the deceased, had he lived, would have applied his income from his earnings or otherwise to his personal expenditures from which claimants would have derived no benefits;

(*f*) In reducing to their present cash value contributions which would probably have been made from time to time to claimants by deceased, a 5 per cent interest rate and standard present-value tables will be used;

(*g*) Neither the physical pain nor the mental anguish which the *deceased* may have suffered will be considered as elements of damage;

(*h*) The amount of insurance on the life of the deceased collected by his estate or by the claimants will not be taken into account in computing the damages which claimants may be entitled to recover;

(*i*) No exemplary, punitive, or vindictive damages can be assessed.

The foregoing statement of the rules for measuring damages in death cases will be applied by the American agent and the German agent and their respective counsel in the preparation and submission of all such cases. The enumeration of factors to be taken into account in assessing damages will not be considered as exclusive of all others. When either party conceives that other factors should be considered, having a tendency either to increase or decrease the *quantum* of damages, such factors will be called to the attention of the commission in the presentation of the particular case.

Most of the elements entering into the rules here expressed for measuring damages, and the factors to be taken into account in applying them, are so obviously sound and firmly established by both the civil and common law authorities as to make further elaboration wholly unnecessary. As counsel for Germany, however, very earnestly contends that the mental suffering of a claimant does not constitute a recoverable element of damage in death cases, and also contends that life insurance paid claimants on the happening of the death of deceased should be deducted in estimating the claimant's loss, we will state the reasons why we are unable to adopt either of these contentions. The American counsel, with equal earnestness, contends that exemplary, punitive, and vindictive damages should be assessed against Germany for the use and benefit of each private claimant. For the reasons hereinafter set forth at length this contention is rejected.

Mental suffering.—The legal concept of damages is judicially ascertained compensation for wrong. The compensation must be adequate and balance as near as may be the injury suffered. In many tort cases, including those for personal injury and for death, it is manifestly impossible to compute mathematically or with any degree of accuracy or by the use of any precise formula the damages sustained, involving such inquiries as how long the deceased would probably have lived but for the fatal injury; the amount he would have earned, and of such earnings the amount he would have contributed to each member of his family; the pecuniary value of his supervision over the education and training of his children; the amount which will reasonably compensate an injured man for suffering

Mental suffering.

excruciating and prolonged physical pain; and many other inquiries concerning elements universally recognized as constituting recoverable damages. This, however, furnishes no reason why the wrongdoer should escape repairing his wrong or why he who suffered should not receive reparation therefor measured by rules as nearly approximating accuracy as human ingenuity can devise. To deny such reparation would be to deny the fundamental principle that there exists remedy for the direct invasion of every right.

Mental suffering is a fact just as real as physical suffering, and susceptible of measurement by the same standards. The interdependency of the mind and the body, now universally recognized, may result in a mental shock producing physical disorders. But quite apart from any such result, there can be no doubt of the reality of mental suffering, of sickness of mind as well as sickness of body, and of its detrimental and injurious effect on the individual and on his capacity to produce. Why, then, should he be remediless for this injury? The courts of France under the provisions of the Code Napoleon have always held that mental suffering or "prejudice morale" is a proper element to be considered in actions brought for injuries resulting in death. A like rule obtains in several American States, including Louisiana, South Carolina, and Florida.[6] The difficulty of measuring mental suffering or loss of mental capacity is conceded, but the law does not refuse to take notice of such injury on account of the difficulty of ascertaining its degree.

On careful analysis it will be found that decisions announcing a contrary rule by some of the American courts are measurably influenced by the restrictions imposed by the language of the statutes creating the right of action for injuries resulting in death. As hereinafter pointed out, these very restrictions have in some instances driven the courts to permit the juries to award as exemplary damages what were in truth compensatory damages for mental suffering, rather than leave the plaintiff without a remedy for a real injury sustained.

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[6] *Nohrden* v. *Northeastern Railroad Co.*, 1900, 59 South Carolina Reports 87, 105–108, 37 Southeastern Reporter 228, 238–240; *Stuckey* v. *Atlantic Coast Line Railroad Co.*, 1901, 60 South Carolina Reports 237, 253; *Bourg* v. *Brownell-Drews Lumber Co.*, 1908, 120 Louisiana Reports 1009, 1022–1026, 45 Southern Reporter 972, 977–978; *Seaboard Air Line Railway* v. *Moseley*, 1910, 60 Florida Reports 186, 189–190; *Underwood* v. *Gulf Refining Co.*, 1911, 128 Louisiana Reports 869, 986, 990–1003; *Johnson* v. *Industrial Lumber Co.* 1912, 131 Louisiana Reports 897, 908–909.

Mental suffering to form a basis of recovery must be real and actual, rather than purely sentimental and vague.[7]

Insurance not to benefit wrong doer.

Insurance.—Counsel for Germany insist that in arriving at claimants' net loss there should be deducted from the present value of the contributions which the deceased would probably have made to claimants had he lived all payments made to claimants under policies of insurance on the life of deceased. The contention is opposed to all American decisions and the more recent decisions of the English courts. The various reasons given for these decisions are, however, for the most part inconclusive and unsatisfactory. But it is believed that the contention here made by the counsel for Germany is based upon a misconception of the essential nature of life insurance and the relations of the beneficiaries thereto.

Unlike marine and fire insurance, a life insurance contract is not one of indemnity, but a contract absolute in its terms for the payment of an amount certain on the happening of an event certain—death—at a time uncertain. The consideration for the claimants' contract rights is the premium paid. These premiums are based upon the risk taken and are proportioned to the amount of the policy. The contract is in the nature of an investment made either by, or in behalf of, the beneficiaries. The claimants' rights under the insurance contracts existed prior to the commission of the act complained of, and prior to the death of deceased. Under the terms of the contract these rights were to be exercised by claimants upon the happening of a certain event. The mere fact that the act complained of hastened that event can not inure to Germany's benefit, as there was no uncertainty as to the happening of the event, but only as to the *time* of its happening. Sooner or later payment must be made under the insurance contract. Such payment of insurance, far from springing from Germany's act, is entirely foreign to it. If it be said that the acceleration of death secures to the claimants *now* what might otherwise have been paid to others had deceased survived claimants, and that therefore claimants may *possibly* have benefited through Germany's act, the answer is that the law will not for the benefit of the wrongdoer enter the domain of speculation and consider the probability or probabilities

[7] Sedgwick, sec. 46a.

in order to offset an absolute and certain contract right against the uncertain damages flowing from a wrong.

Use of life-expectancy and present-value tables.—Ordinarily the facts to which must be applied the rules of law in measuring damages in death cases lie largely in the future. It results that, absolute knowledge being impossible, the law of probabilities and of averages must be resorted to in estimating damages, and these preclude the possibility of making any precise computations or mathematical calculations. As an aid—but solely as an aid—in estimating damages in this class of cases, the commission will consider the standard life-expectancy and present-value tables. These will be used not as absolute guides but in connection with other evidence, such as the condition of the health of deceased, the risks incident to his vocation, and any other circumstances tending to throw light on the probable length of his life but for the act of Germany complained of. To the extent that happenings subsequent to the death of deceased make certain what was before uncertain, to such extent the rules of probabilities will be discarded.

Use of insurance tables.

Neither will we lose sight of the fact that life tables are based on statistics of the length of life of individuals, not upon the duration of their physical or mental capacity or of their earning powers. In using such tables it will be borne in mind that the present value of the probable earnings of deceased depends on many more unknowable contingencies than does the present value of a life annuity or dower. Included among these contingencies are possible and probable periods of illness, periods of unemployment even when well, and various degrees of disability arising from gradually increasing age. The weight to be given to such tables will, therefore, be determined by the commission in the light of the facts developed in each particular case.

Exemplary damages.—American counsel with great earnestness insists that exemplary, or, as they are frequently designated, punitive and vindictive, damages should be assessed by this commission against Germany in behalf of private claimants. Because of the importance of the question presented the nature of exemplary damages will be examined and the commission's reasons for declining to assess such damages will be fully stated.

Undoubtedly the rule permitting the recovery of exemplary damages as such is firmly intrenched in the

Exemplary damages.

jurisprudence of most of the States of the American Union, although it has been repudiated by the courts of several of them and its soundness on principle is challenged by some of the leading American text writers.[8]

The reason for the rule authorizing the imposition of exemplary in addition to full reparation or compensatory damages is that they are justified "by way of punishing the guilty, and as an example to deter others from offending in like manner."[9] The source of the rule is frequently traced to a remark alleged to have been made by Lord Chief Justice Pratt (afterwards Lord Camden) in instructing a jury (italics ours) that :[10]

"Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and *as a proof of the detestation of the jury to the action itself.*"

That such a charge was ever in fact given has been questioned.[11] However this may be, this alleged instruction has been quoted and requoted by the courts of England and of America as authority for the awarding of exemplary damages where the tort complained of has been wilfully or wantonly or maliciously inflicted.

In some of the earlier cases the awards of exemplary damages were sustained "for example's sake" and "to prevent such offense in the future," and again "to inflict damages for example's sake and by way of punishing the defendant." In one early New York case[12] it was said:

"We concede that smart money allowed by a jury, and a fine imposed at the suit of the people, depend on the same principle. Both are penal, and intended to deter others from the commission of the like crime."

In our opinion the words exemplary, vindictive, or punitive as applied to *damages* are misnomers. The fundamental concept of "damages" is satisfaction, reparation for a *loss* suffered; a judicially ascertained *compensation* for wrong.[13] The remedy should be commensurate with the loss, so that the injured party may

[8] *Fay* v. *Parker*, 1873, 53 New Hampshire Reports 342; Sedgwick, sec. 354; Greenleaf on Evidence, 15th (1892) edition, Vol. II, secs. 253, 254, 266, and 267.

[9] *Lake Shore & Michigan Southern Railway Co.* v. *Prentice*, 1893, 147 United States Reports 101, 107.

[10] *Wilkes* v. *Wood*, 1763, 19 Howell's State Trials (1816) 1153, 1167, Lofft's Reports (1790), pages 1 and 19 of first case.

[11] Sedgwick, sec. 350.

[12] *Cook* v. *Ellis*, 1844, 6 Hill's (New York) Reports 466, 467.

[13] Sedgwick, sec. 571a.

be made whole.[14] The superimposing of a penalty in addition to full compensation and naming it damages, with the qualifying word exemplary, vindictive, or punitive, is a hopeless confusion of terms, inevitably leading to confusion of thought. Many of the American authorities lay down the rule that where no actual damage has been suffered no exemplary damages can be allowed, giving as a reason that the latter are awarded, not because the *plaintiff* has any *right* to recover them, but because the *defendant* deserves punishment for his wrongful acts; and that, as the plaintiff can not maintain an action merely to inflict punishment upon a supposed wrongdoer, if he has no cause of action independent of a supposed right to recover exemplary damages, he has no cause of action at all.[15] It is apparent that the theory of the rule is not based upon any *right* of the *plaintiff* to receive the award assessed against the defendant, but that the *defendant* should be *punished.* The more enlightened principles of government and of law clothe the state with the sole power to punish but insure to the individual full, adequate, and complete compensation for a wrong inflicted to his detriment.[16]

An examination of the American authorities leads to the conclusion that the exemplary damage rule owes its origin and growth, to some extent at least, to the difficulties experienced by judges in tort cases of clearly defining in their instructions to juries the different factors which may be taken into account and readily applied by them in assessing the *quantum* of damages which a plaintiff may recover. It is difficult to lay down any rule for measuring injury to the feelings, or humiliation or shame, or mental suffering, and yet it frequently happens that such injuries *are very real and call for compensation as actual damages* as much as

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[14] Grotius, Book II Chap. XVII, Sec. X: Blackstone's Commentaries, Book II, chap. 29, Sec. VII, par. 2 (*p. 438); Sedgwick; sec. 29.

[15] *Schippel* v. *Norton*, 1888, 38 Kansas Reports 567, 572; *Meighan* v. *Birmingham Terminal Co.*, 1910, 165 Alabama Reports 591, 599.

[16] Vattel's Law of Nations, Chitty edition with notes by Ingraham ,1852 (1857), (hereinafter cited as "Vattel") Book I, sec. 169, where it is said: "Now, when men unite in society—as the society is thenceforward charged with the duty of providing for the safety of its members, the individuals all resign to it their private right of punishing. To the whole body, therefore, it belongs to avenge private injuries, while it protects the citizens at large. And as it is a moral person, capable also of being injured, it has a right to provide for its own safety, by punishing those who trespass against it—that is to say, it has a right to punish public delinquents. Hence arises the right of the sword, which belongs to a nation, or to its conductor. When the society use it against another nation, they make war; when they exert it in punishing an individual, they exercise vindictive justice."

physical pain and suffering and many other elements which, though difficult to measure by pecuniary standards, are, nevertheless, universally considered in awarding compensatory damages. The trial judges, following the lead of Lord Camden,[17] have found it easier to permit the juries to award plaintiffs in the way of damages a penalty assessed against defendants guilty of willful, malicious, or outrageous conduct toward the plaintiffs, rather than undertake to formulate rules to enable the juries to measure in pecuniary terms the extent of the actual injuries.[18] In cases cited and numerous others, the damages dealt with and designated by the court as "exemplary" were in their nature purely compensatory and awarded as reparation for actual injury sustained.

That one injured is, under the rules of international law, entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt, and such compensation should be commensurate to the injury. Such damages are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefor as compensatory damages, but not as a penalty. The tendency of the decisions and statutes of the several American States seems to be to broaden the scope of the elements to be considered in assessing actual and compensatory damages, with the corresponding result of narrowing the application of the exemplary damages rule.[19]

The industry of counsel has failed to point us to any money award by an international arbitral tribunal where

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[17] *Wilkes* v. *Wood*, note 10 *supra*.

[18] *Boydan* v. *Haberstumpf*, 1901, 129 Michigan Reports 137, where it was held (p. 140; italics ours) that the term "exemplary damages," as employed in Michigan, "has generally been understood to mean an increased award of damages in view of the supposed *aggravation* of the injury to the feelings by the wanton or reckless act of the defendant," and that "It has never been the policy of the court to permit juries to award captiously any sum which may appear just to them, *by way of punishment* to the offender, but rather to award a sum in addition to the actual proven damages, as what, in their judgment, constitutes a *just measure of compensation* for injury to feelings, in view of the circumstances of each particular case."

Pegram v. *Stortz*, 1888, 31 West Virginia Reports 220, 229, 242–243; *Gillingham* v. *Ohio River Railroad Co.*, 1891, 35 West Virginia Reports 588, 599–600; *Levy* v. *Fleischner, Mayer & Co.*, 1895, 12 Washington Reports 15, 17–18.

[19] See the cases cited in note 6 above. In the case cited from 128 Louisiana Reports the court said, at page 992, "the idea that damages allowed for mental suffering are exemplary, punitory, or vindictive in their character has been very generally abandoned, and they are now recognized by this court and other courts as actual and compensatory."

exemplary, punitive, or vindictive damages have been assessed against one sovereign nation in favor of another presenting a claim in behalf of its nationals.[20] Great stress is laid by counsel on the Moses Moke case [21] which arose under the convention between the United States and Mexico of July 4, 1868. Moke, an American citizen, was subjected to a day's imprisonment to "force" him to "loan" $1,000. He sought to recover the amount of the "loan" and damages. The American Commissioner Wadsworth, speaking for the commission, said:

Moke case.

"We wish to condemn the practice of forcing loans by the military, and think an award of $500 for 24 hours' imprisonment will be sufficient * * *. If larger sums in damages, in such cases, were needed to vindicate the right of individuals to be exempt from such abuses, we would undoubtedly feel required to give them."

This *language* is the nearest approach to a recognition of the doctrine of exemplary damages that we have found in any reported decision of a mixed arbitral tribunal, but we do not regard the *decision* in this case as a recognition of this doctrine. On the contrary, an award of $500 for the humiliation and inconvenience suffered by this American citizen for the outrageous treatment accorded

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[20] "International Arbitral Law and Procedure," by Jackson H. Ralston, 1910, sec. 369, where he says:

"While there is little doubt that in many cases the idea of punishment has influenced the amount of the award, yet we are not prepared to state that any commission has accepted the view that it possessed the power to grant anything save compensation. * * *"

Borchard's "The Diplomatic Protection of Citizens Abroad," 1915 (1922), sec. 174, makes substantially the same statement in these words: "Arbitral commissions, while often apparently taking into consideration the seriousness of the offense and the idea of punishment in fixing the amount of an award, have generally regarded their powers as limited to the granting of compensatory, rather than exemplary, damages."

Doctor Lieber, umpire of the commission under the convention of July 4, 1868, between the United States and Mexico, in awarding the sum of $4,000 on an $85,000 claim, said (p. 4311, Vol. IV, of Moore's "History and Digest of the International Arbitrations to which the United States Has Been a Party," 1898, hereinafter cited as "Moore's Arbitrations"): "Nor can these high damages be explained as exemplary damages. Our commission has no punitive mission, nor is there any offense to be punished."

See also opinion of Umpire Bertinatti in the case of Ogden, administrator of the estate of Isaac Harrington, in which an award of $1,000 was made on an original demand of $160,000 where the claim was made that an American citizen was treated oppressively and with great indignity by Costa Rica. II Moore's Arbitrations, p. 1566.

[21] IV Moore's Arbitrations, 3411.

Counsel also lays much stress on the language used by Umpire Duffield of the German-Venezuelan Mixed Claims Commission in the Metzger case (pp. 578-580, "Venezuelan Arbitrations of 1903," report by Jackson H. Ralston, 1904, hereinafter cited as "Venezuelan Arbitrations 1903"), where it is said (p. 580; italics ours): "Neither can anything be allowed in the way of punitive or exemplary damages against Venezuela, *because* it appears, as above stated, that the general commanding the army promptly took action against the offender and punished him by imprisonment." Clearly this is *dictum*. The case was apparently correctly decided and there was no reason for giving any careful consideration to the *right* of the commission to go further than award compensatory damages.

him by the Mexican authorities can hardly be said to be adequate compensation. Certainly the award has in it none of the elements of punishment, nor can it be evoked as an example to deter other nations from according similar treatment to American citizens.

But it is not necessary for this commission to go to the length of holding that exemplary damages can not be awarded in *any* case by *any* international arbitral tribunal. A sufficient reason why such damages can not be awarded by *this* commission is that it is without the power to make such awards under the terms of its charter—the treaty of Berlin. It will be borne in mind that this is a "treaty between the United States and Germany restoring friendly relations"—a treaty of peace. Its terms negative the concept of the imposition of a penalty by the United States against Germany, save that the undertaking by Germany to make reparation to the United States and its nationals as stipulated in the treaty may partake of the nature of a penalty.[22]

Treaty obligations.

Part VII of the treaty of Versailles (arts. 227 to 230, inclusive) deals with "penalties." It is significant that these provisions *were not* incorporated in the treaty of Berlin.

In negotiating the treaty of peace, the United States and Germany were of course dealing directly with each other. Had there been any intention on the part of the United States to exact a penalty either as a punishment or as an example and a deterrent, such intention would have been clearly expressed in the treaty itself; and, had it taken the form of a money payment, would have been claimed by the Government of the United States on its own behalf and not on behalf of its nationals. As to such nationals, care was taken to provide for full and adequate "indemnities," "reparations," and "satisfaction" of their claims for losses, damages, or injuries suffered by them. While under that portion of the treaty of Versailles which has by reference been incorporated in the treaty of Berlin, Germany "accepts" responsibility for all loss and damage to which the United States and its nationals have been subjected as a consequence of the war, nevertheless the United States frankly recognizes

[22] Oppenheim on International Law, 3d (1920) edition (hereinafter cited as "Oppenheim"), Vol. II, sec. 259a, p. 353, where it is said (italics ours): "There is no doubt that if a belligerent can be made *to pay compensation for all damage* done by him in violating the laws of war, this will be an indirect means of securing legitimate warfare."

the fact "that the resources of Germany are not adequate * * * to make complete reparation for all such loss and damage", but requires that Germany make "compensation" for specified damages suffered by American nationals.[23] For the enormous cost to the Government of the United States in prosecuting the war no claim is made against Germany. No claims against Germany are being asserted by the Government of the United States on account of pensions paid, and compensation in the nature of pensions paid, to naval and military victims of the war and to their families and dependents.[24] In view of this frank recognition by the Government of the United States of Germany's inability to make to it full and complete reparation for all of the consequences of the war, how can it be contended that there should be read into the treaty an obligation on the part of Germany to pay penalties to the Government of the United States for the use and benefit of a small group of American nationals for whose full and complete compensation for losses sustained adequate provision has been made?

The United States is in effect making one demand against Germany on some 12,500 counts. That demand is for compensation and reparation for certain losses sustained by the United States and its nationals. While in determining the amount which Germany is to pay, each claim must be considered separately, no one of them can be disposed of as an isolated claim or suit, but must be considered in relation to all others presented in this one demand. In all of the claims the parties are the same. They must all be determined and disposed of under the same treaty and by the same tribunal. If it were possible to read into the treaty a provision authorizing this commission to assess a penalty against Germany as a punishment or as an example or deterrent, what warrant is there for allocating such penalty or any part of it to any particular claim and how should it be distributed? Why should one American national who has sustained a loss receive in addition to full compensation "smart money" rather than another? Should the full amount of the penalty be imposed in connection with a particular claim or in connection with a particular incident out of which a number of claims arose or in connection with all acts of a particular class? Why impose a penalty for the

[23] Arts. 231 and 232 and Annex I to Sec. I of Pt. VIII of the treaty of Versailles.

[24] See note 11 to this commission's Administrative Decision No. II handed down this day.

use and benefit of a small group of American nationals who are awarded full compensation and at the same time waive reimbursement for the cost of the war which falls on all American taxpayers alike?

If it were competent for this commission to impose such a penalty, what penalty stated in terms of dollars would suffice as a deterrent? And if this commission should arrogate to itself the authority to impose in the form of damages a penalty which would effectively serve as a deterrent, where lie the boundaries of its powers? It is not hampered with any constitutional limitations save those found in the treaty; and if the power to impose a penalty exists under the treaty may not the commission exercise that power in a way to affect the future political relations of the two Governments?[25] The mere statement of the question is its answer. Putting the inquiry only serves to illustrate how repugnant to the fundamental principles of international law is the idea that this commission should treat as justiciable the question as to what penalty should be assessed against Germany as a punishment for its alleged wrongdoing. It is our opinion that as between sovereign nations the question of the right and power to impose penalties unlimited in amount is political rather than legal in its nature, and therefore not a subject within the jurisdiction of this commission.

Treaty construction.

The treaty is our charter. We can not look beyond its express provisions or its clear implications in assessing damages in any particular claim. We hold that its clear and unambiguous language does not authorize the imposition of penalties. Hence the fundamental maxim "It is not allowable to interpret that which has no need of interpretation" applies.[26] But all of the rules governing the interpretation of treaties would lead to the same result were it competent for us to look to them. Some of these are: The treaty is based upon the resolution of the Congress of the United States, accepted and adopted by Germany. The language, being that of the United States and framed for its benefit, will be strictly construed against it.[27] Treaty provisions must be so construed as

[25] Vattel, Book II, Chap. XVIII, sec. 329.

[26] Vattel, Book II, Chap. XVII, sec. 263.

[27] Vattel, Book II, Chap. XVII, sec. 264: Digest of Justinian, Book II, Title XIV, par. 39, Monro translation, 1904; "Treaties—Their Making and Enforcement" by Samuel B. Crandall, 2d (1916) edition (hereinafter cited as "Crandal"), sec. 171, p. 401; Pothier on Obligations (Evans, 1806), Vol. I, p. 58 (seventh rule, Art. VII, Chap. I, Pt. I): Woolsey on International Law, sixth (1891) edition, sec. 113; opinion of Ralston, umpire, Italian-Venezuelan Mixed Claims Commission, Sambiaggio case, Venezuelan Arbitrations 1903, pp. 666 and 688–689.

to best conform to accepted principles of international law rather than in derogation of them.[28] Penal clauses in treaties are odious and must be construed most strongly against those asserting them.[29]

The treaty is one between two sovereign nations—a treaty of peace. There is no place in it for any vindictive or punitive provisions. Germany must make compensation and reparation for all losses falling within its terms sustained by American nationals. That compensation must be full, adequate, and complete. To this extent Germany will be held accountable. But this commission is without power to impose penalties for the use and benefit of private claimants when the Government of the United States has exacted none.

Decision.

This decision in so far as applicable shall be determinative of all cases growing out of the sinking of the steamship *Lusitania*. All awards in such cases shall be made as of this date and shall bear interest from this date at the rate of 5 per cent per annum.

Done at Washington November 1, 1923.

EDWIN B. PARKER,
Umpire.

Concurring in the conclusions:

CHANDLER P. ANDERSON,
American Commissioner.

W. KIESSELBACH,
German Commissioner.

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[28] Opinion of Plumley, umpire, in Arao Mines (Ltd.) case, British-Venezuelan Mixed Claims Commission, pp. 344 and 386–387 Venezuelan Arbitrations 1903; reference to Sambiaggio case in note 27 above; *Vilas* v. *Manila*, 1911, 220 United States 345, 358–359; Crandall, sec. 170.

[29] Vattel, Book II, Chap. XVII, secs. 301–303; Crotius, Book II, Chap. XVI, Sec. X and par. 3 of Sec. XII.

OPINION CONSTRUING THE PHRASE "NAVAL AND MILITARY WORKS OR MATERIALS" AS APPLIED TO HULL LOSSES AND ALSO DEALING WITH REQUISITIONED DUTCH SHIPS

March 25, 1924.

(Mixed Claims Commission, United States and Germany, p. 75)

The United States of America on its own behalf, acting through the United States Shipping Board and/or the United States Shipping Board Emergency Fleet Corporation, and on behalf of certain of its nationals suffering losses at sea, *v. Germany*. Docket Nos. 29, 127, and 546–556 inclusive.

PARKER, *Umpire*, delivered the opinion of the commission, the German Commissioner concurring in the conclusions, and the American commissioner concurring save as his dissent is indicated:

There is here presented a group of 13 typical cases in which the United States, in some instances on its own behalf and in others on behalf of certain of its nationals, is seeking compensation for losses suffered through the destruction of ships by Germany or her allies during the period of belligerency. These claims do not embrace damages resulting from loss of life, injuries to persons, or destruction of cargoes but are limited to losses of the ships themselves, sometimes hereinafter designated "hull losses." [30]

Limitation of question.

With the exception of the construction and the application to requisitioned Dutch ships of the phrase "property * * * belonging to" as found in paragraph 9 of Annex I to Section I of Part VIII of the treaty of Versailles as carried by reference into the treaty of Berlin, the sole question considered and decided in this opinion is: Were any or all of the 13 hulls in question when destroyed "naval and military works or materials" within the meaning of that phrase as used in that paragraph?

The cases in which an affirmative answer to this question is given must, on final submission, be dismissed on the ground that Germany is not obligated to pay such losses under the treaty of Berlin. The cases in which a negative answer is given will be reserved by the commission for further consideration of the other issues raised.

The commission is not here concerned with the quality of the act causing the damage. The terms of the treaty

[30] Reference is made to definition of terms contained in Administrative Decision No. I.

fix and limit Germany's obligations to pay, and the commission is not concerned with inquiring whether the act for which she has accepted responsibility was legal or illegal as measured by rules of international law. It is probable that a large percentage of the financial obligations imposed by said paragraph 9 would not arise under the rules of international law but are terms imposed by the victor as one of the conditions of peace.

Previous construction.

The phrase "naval and military works or materials" has no technical signification. It is not found in previous treaties. It has never been construed judicially or by any administrative authority save the reparation commission. The construction by that body is not binding on this commission nor is it binding on Germany under the treaty of Berlin. It will, however, be considered by this commission as an early *ex parte* construction of this language of the treaty by the victorious European allies, who participated in drafting it and are the principal beneficiaries thereunder.

The construction of this phrase is of first impression, and the commission must, in construing and applying it, look to its context. It is found in the principal reparation provisions of the treaty of Versailles as embraced in article 232 and the Annex I expressly referred to therein. That article, after reciting that the "allied and associated governments recognize that the resources of Germany are not adequate * * * to make complete reparation for all" losses and damages to which they and their nationals had been subjected as a consequence of the war, provides that:

Treaty of Versailles.

"The allied and associated Governments, however, require, and Germany undertakes, that she will make compensation for all damage done to the civilian population of the allied and associated powers and to their property during the period of the belligerency of each as an allied or associated power against Germany by such aggression by land, by sea, and from the air, and in general all damage as defined in Annex I hereto."

Reparation

It is apparent that the controlling consideration in the minds of the draftsmen of this article was that Germany should be required to make *compensation* for all damages suffered by the *civilian population* of each of the allied and associated powers during the period of its belligerency. It was the reparation of the private losses sustained by the *civilian population* that was uppermost in the minds of

the makers of the treaty rather than the public losses of the governments of the allied and associated powers which represented the cost to them of prosecuting the war.[32]

Article 232 makes express reference to "Annex I hereto" as more particularly defining the damages for which Germany is obligated to make compensation. Annex I provides that "compensation may be claimed from Germany under article 232 above in respect of the total damage under the following categories." Then follows an enumeration of 10 categories, of which Nos. 1, 2, 3, 4, 8, and 10 deal solely with damages suffered by the civilian populations of the allied and associated powers. Categories 5, 6, and 7 deal with reimbursement to the governments of the allied and associated powers as such of the cost to them of pension and separation allowances, rather than damages suffered by the "civilian population." The Government of the United States has expressly committed itself against presenting claims arising under these three categories.[33] There remains of the 10 categories enumerated in Annex I only category 9, which reads:

"(9) Damage in respect of all property wherever situated belonging to any of the allied or associated states or their nationals, with the exception of naval and military works or materials, which has been carried off, seized, injured or destroyed by the acts of Germany or her allies on land, on sea, or from the air, or damage directly in consequence of hostilities or of any operations of war."

Excepted class.

Under the terms of this paragraph arise Germany's financial obligations, if any, to pay the claims now before this commission for the hulls destroyed during the period of belligerency.

It can not be doubted that the language of this paragraph 9 so expands that used in article 232 as to include certain property losses sustained by the governments of the allied and associated powers as well as the losses sustained by their "civilian populations." It was found that

Government property.

[32] The reparations provided for in the exchange of notes between the United States and Germany eulminating in the armistiee of November 11, 1918, executed by the military representatives of the belligerent powers, were limited to reparations for losses to the eivilian population. The Lansing note of November 5, 1918, provides that the allied powers "understand that eompensation will be made by Germany for all damage done *to the civilian population* of the Allies and their property by the aggression of Germany by land, by sea, and from the air."

Italies appearing throughout this opinion are, as a rule, added by the commission.

[33] See note 11 of Administrative Decision No. 11, pp. 14 and 15 of Decisions and Opinions of this commission.

property belonging to the victorious powers not designed or used for military purposes had been destroyed or damaged, so in addition to requiring that Germany compensate the civilian population for their property losses this paragraph requires that Germany shall also compensate those governments for government losses suffered through destruction or damage with respect to property of a non-military character. Much property belonging to the governments of the victorious powers, especially to the governments of the European allies, and not impressed by reason of its inherent nature or of its use with a military character, had been destroyed or damaged. Under this provision it is clear that Germany is obligated to compensate the governments suffering such losses. But, reading the reparation provisions as a whole, it is equally clear that the allied and associated powers did not intend to require that Germany should compensate them, and that Germany is not obligated to compensate them, for losses suffered by them resulting from the destruction or damage of property impressed with a military character either by reason of its inherent nature or by the use to which it was devoted at the time of the loss. Property so impressed with a military character is embraced within the phrase "naval and military works or materials" as used in paragraph 9, which class described by this phrase will sometimes hereinafter be referred to as "excepted class."

This phrase, in so far as it applies to hulls for the loss of which claims are presented to this commission, relates solely to ships operated by the United States, not as merchantmen, but directly in furtherance of a military operation against Germany or her allies. A ship privately operated for private profit can not be impressed with a military character, for only the government can lawfully engage in direct warlike activities.

"Materials."

By the terms of the treaty of Versailles, the French and English texts are both authentic. The French word "matériel," in the singular, is used in the French text, against which the English word "materials," in the plural, is used in the English text. Littré, whose dictionary is accepted as an authority on the French language, defines "matériel" thus: "The articles of all kinds taken as a whole which are used for some public service in contradistinction to personnel," and he gives as an example

matériel of an army, the baggage, ammunition, etc., as distinguished from the men.

The Century Dictionary defines this French word thus: "The assemblage or totality of things used or needed in carrying on any complex business or operation, in distinction from the *personnel*, or body of persons, employed in the same: applied more especially to military supplies and equipments, as arms, ammunition, baggage, provisions, horses, wagons, etc."

The English word "materials" means the constituent or component parts of a product or "that of or with which any corporeal thing is or may be constituted, made, or done" (Century Dictionary).

Reading the French and English texts together, it is apparent that the word "materials" is here used in a broad and all inclusive sense, with respect to all physical properties not attached to the soil, pertaining to either the naval or land forces and impressed with a military character; while the word "works" connotes physical properties attached to the soil, sometimes designated in military parlance as "installations," such as forts, naval coast defenses, arsenals, dry docks, barracks, cantonments, and similar structures. The term "materials" as here used includes raw products, semifinished products, and finished products, implements, instruments, appliances, and equipment, embracing all movable property of a physical nature from the raw material to the completed implement, apparatus, equipment, or unit, whether it were an ordinary hand grenade or a completed and fully equipped warship, provided that it was used by either the naval or land forces of the United States in direct furtherance of a military operation against Germany or her allies.

While it is difficult if not impossible to so clearly define the phrase "naval and military works or materials" that the definition can be readily applied to the facts of every claim for the loss of a hull pending before this commission, the true test stated in general terms is: Was the ship when destroyed being operated by the United States for purposes directly in furtherance of a military operation against Germany or her allies? If it was so operated, then it is embraced within the excepted class and Germany is not obligated to pay the loss. If it was not so operated, it is not embraced within the excepted class and Germany is obligated to pay the loss.

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The United States Shipping Board (sometimes hereinafter referred to as "Shipping Board") exerted such a far-reaching influence over American shipping both prior to and during the period of American belligerency that the scope and effect of its activities and powers must be clearly understood in order to reach sound conclusions with respect to the cases here under consideration.

Shipping Board.

The Shipping Board was established in pursuance of the act of the Congress of the United States of September 7, 1916 (39 Statutes at Large, 728), entitled "An act to establish a United States Shipping Board for the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its Territories and possessions and with foreign countries; to regulate carriers by water engaged in the foreign and interstate commerce of the United States; and for other purposes." The act as amended provided that the members of the board should be appointed by the President subject to confirmation by the Senate; that they should be selected with due regard for the efficient discharge of the duties imposed on them by the act; that two should be appointed from States touching the Pacific Ocean, two from States touching the Atlantic Ocean, one from States touching the Gulf of Mexico, one from States touching the Great Lakes, and one from the interior, but that not more than one should be appointed from the same State and not more than four from the same political party. All employees of the board were selected from lists supplied by the Civil Service Commission and in accordance with the civil-service law. The board was authorized to have constructed and equipped, as well as "to purchase, lease, or charter, vessels *suitable, as far as the commercial requirements of the marine trade of the United States may permit*, for use as naval auxiliaries or Army transports, or for other naval or military purposes."

The President was authorized to transfer "either permanently or for limited periods to the board such vessels belonging to the War or Navy Department *as are suitable for commercial uses* and not required for military or naval use in time of peace."

Provision was made for the American registry and enrollment of vessels purchased, chartered, or leased from the board and it was provided that "Such vessels *while*

employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, *whether the United States be interested therein as owner,* in whole or in part, or hold any mortgage, lien, or other interest therein."

Fleet Corporation.

The board was authorized to create a corporation with a capital stock of not to exceed $50,000,000 "for the purchase, construction, equipment, lease, charter, maintenance, and operation *of merchant vessels in the commerce of the United States.*" In pursuance of this latter provision the United States Shipping Board Emergency Fleet Corporation (sometimes hereinafter referred to as "Fleet Corporation") was organized under the laws of the District of Columbia with a capital stock of $50,000,000, all fully paid and all held and owned by the United States save the qualifying shares of the trustees. Under the terms of the act, this corporation could not engage in the *operation* of vessels owned or controlled by it unless the board should be unable to contract with citizens of the United States for the purchase or operation thereof.

Then followed in the act numerous provisions clothing the board with broad powers with respect to transportation by water of passengers or property in interstate and foreign commerce, provisions for investigations and hearings, for the fixing of maximum rates, and for penalties for failure to observe the terms of the statutes and the orders of the board.

The act as amended provided that it "may be cited as 'shipping act, 1916.' " The board created by virtue of its terms possessed none of the indicia of a military tribunal. Its members, all civilians, were drawn from remote sections, that the board might represent the commercial and shipping interests of the entire Nation. The act taken in its entirety indicates that the controlling purpose of the Congress was to promote the development of an American merchant marine and also "*as far as the commercial requirements of the marine trade of the United States may permit*" provide vessels susceptible of "use as naval auxiliaries or Army transports, or for other naval or military purposes". This act was approved September 7, 1916, during the period of American neutrality. The World War had found American nationals engaged in an extensive foreign commerce but without an adequate merchant marine to keep it afloat. The channels of American foreign commerce would have

been choked but for the use of belligerent bottoms with the resultant risks. This situation, coupled with the possibility of the developments of the war forcing American participation therein, prompted the enactment of this statute for the creation of a merchant marine and setting up the machinery for the mobilization and control of all American shipping.

Following America's entrance into the war on April 6, 1917, Congress through the enactment of several statutes clothed the President of the United States with broad powers including the taking over of title or possession by purchase or requisition of constructed vessels or parts thereof or charters therein and the operation, management and disposition of such vessels and all other vessels theretofore or thereafter acquired by the United States. From time to time through Executive orders the President being thereunto duly authorized, delegated these powers with respect to shipping to the Shipping Board, to be exercised directly by it or, in its discretion, by it through the Fleet Corporation.

Requisition.

Under these powers the Shipping Board and the Fleet Corporation proceeded to requisition the use of all power-driven steel cargo vessels of American registry of 2,500 tons dead weight or over and all passenger vessels of American registry of 2,500 tons gross registry or over adapted to ocean service. Immediately upon the execution of these requisition orders a "requisition charter" was entered into between the Shipping Board and the owner, fixing the compensation to be paid by the United States to the owner for the use of the vessel and providing for the operation of the vessel on what was known as the "time-form" basis, the board reserving the right to change the charter to a "bare-boat" basis on giving five days' notice. The time-form basis provided for the operation of the vessel by the owner as agent of the United States and fixed the terms and conditions of such operation, stipulating, among other things, that the owner should pay all expenses of operation, including the wages and fees of the master, officers, and crew, and should assume all marine risks, including collision liabilities, but that the United States should assume all war risks. The Shipping Board directed the owner as its agent to operate the vessel in its regular trade. The bare-boat basis provided that all the expenses of manning, victualling, and supplying the vessel and all other costs of operation should be borne by

the United States. This latter form was used in requisitioning ships for service in the War Department, and also in some other instances where requisitioned ships were delivered by the Shipping Board to third parties to operate as agents of the United States. When a ship was delivered by the Shipping Board to the War Department no formal agreement was entered into between these two Government agencies, but the War Department recognized the agreement between the Shipping Board and the owner of the vessel and duly accounted to the Shipping Board under the terms and conditions of the requisition charter.

When the requisitioned vessel was redelivered to the owner for operation by him under a time-form requisition charter, an "operating agreement" was also entered into between the Fleet Corporation, acting for the United States, and the owner, whereby the owner as agent of the Fleet Corporation undertook the operation of the vessel, including the procurement of cargoes and the physical control of the ship. For these services the owner as agent received stipulated fees and commissions in addition to the compensation which he received as owner for the use of the vessel as provided in the requisition charter.

When the vessel was requisitioned under a bare-boat form charter and delivered to a third party other than an established government agency to operate, a "managing agreement" was entered into between the Fleet Corporation and such third party whereby the latter as agent for the Fleet Corporation assumed physical control of the ship, receiving fees and commissions for such services.

It was not the practice of the Shipping Board or the Fleet Corporation to issue detailed and minute instructions to agents operating requisitioned vessels with respect to the conduct of the particular voyage or the particular cargoes which such vessels should carry. These operating or managing agents were selected because of their experience and ability in handling commercial shipping. While the United States reserved to itself full power and authority to exercise complete control over vessels requisitioned by it, such control was in practice delegated to the operating or managing agent, who exercised his sound discretion in the management of ships operated by him as agent, with a view to preventing any

unnecessary dislocation of trade or disturbance in the established channels of commerce.

Thus the United States through the agencies of the Shipping Board and the Fleet Corporation effectively and speedily mobilized all American shipping, exercising such control over it that, as emergency required, it could be immediately utilized by the United States in the prosecution of its military operations against its enemies; but pending such emergency the requisitioned vessels were commercially operated, by their owners or by third parties, as agents of the United States, and these agents were given the greatest latitude and freedom of action in the management and control of vessels operated by them in order to prevent any unnecessary disturbance in the free movement of commerce. Under the requisition charter it was expressly stipulated that the vessel "*shall not have the status of a public ship*, and shall be subject to all laws and regulations *governing merchant vessels* * * *. When, however, the requisitioned vessel is *engaged in the service of the War or Navy Department, the vessel shall have the status of a public ship*, and * * * the master, officers, and crew shall become the immediate employees and agents of the United States, with all the rights and duties of such, the vessel passing completely into the possession and the master, officers, and crew absolutely under the control of the United States." At another point in the requisition charter it was stipulated that the master "shall be the agent of the owner in all matters respecting the management, handling, and navigation of the vessel, *except when the vessel becomes a public ship.*"

Military character.

The German agent contends that presumptively the control by the Shipping Board thus exercised over vessels, whether owned by the United States or held by the United States under requisition, was in furtherance of the conduct of the military effort of the United States against Germany, and hence—in the absence of satisfactory proof to the contrary, the burden being on the United States—all such vessels must be classed as "naval and military works or materials." The commission has no hesitation in rejecting this contention. After America entered the war, its entire commerce and industry were in a broad sense mobilized for war. Because of the urgent war requirements, steel and numerous other products became government-controlled commodities,

their uses being rigidly restricted to war purposes. Yet it can not be contended that the fact that an American steel plant was operated 100 per cent on war work raised a *prima facie* presumption of its conversion into "military works." The railroads of the United States were taken over and operated by the Government as a war measure, but this did not presumptively convert them into "military works or materials" within the meaning of that term as used in the treaty of Versailles. Nor can the mobilization for war of American shipping through the agency of the Shipping Board create even a rebuttable presumption that the vessels so mobilized, whether owned or requisitioned by the United States, had a military character. Nothing short of *their operation by the United States directly in furtherance of a military operation against Germany* can have such an effect. So long as such vessels were performing the functions of merchant vessels, even though engaged in a service incident to the existence of a state of war, they will not fall within the excepted class.

Construing the shipping act, the Executive orders of the President, and the provisions of an operating agreement similar to that hereinbefore described, the Supreme Court of the United States held a vessel *owned* by the Fleet Corporation but operated by an American national as an agent of the Shipping Board was a merchant vessel and subject to libel in admiralty for the consequences of a collision.[34] It is apparent that a vessel either owned or requisitioned by the Shipping Board or Fleet Corporation and operated by an agent of the United States under such an operating or managing agreement as hereinbefore described was a merchantman and in no sense impressed with a military character.

When, however, the Shipping Board delivered such vessels to either the War Department or the Navy Department of the United States their status at once changed and they became public ships; their masters, officers, and crews at once became employees and agents of the United States with all of the resultant rights and duties; and it will be presumed that such delivery was made to the military arms of the Government to enable them to be used (in the language of section 5 of the shipping act) "as naval auxiliares or army transports, *or for other naval or military purposes.*" Such assignment of vessels to and their operation by the War Department

[34] The *Lake Monroe* (1919) 250 U. S. 246.

or the Navy Department will be treated by the commission as *prima facie* but not conclusive evidence of their military or naval character. The facts in each case will be carefully examined and weighed by the commission in order to determine whether or not the particular ship, at the time of her destruction was operated by the United States directly in furtherance of a miliatry operation against Germany or her allies. If she was so operated, she will fall within the excepted class; otherwise she will not.

The application of this general rule to the facts as disclosed by the records in the 13 typical cases preliminarily submitted will illustrate its scope and its limitations.

Case No. 127, steamship *Rockingham*

Steamer *Rockingham.*

The steamship *Rockingham*, owned and operated by the Garland Steamship Corporation, an American national, sailed on April 16, 1917, from Baltimore, Md., via Norfolk, Va., which she left April 19, bound for Liverpool, England, with a general cargo for numerous consignees.

Facts of case.

She was armed for defensive purposes with two 4-inch guns, one fore and one aft, manned by a civilian crew of 36, and in addition had a naval gun crew of 13 enlisted men. She was sunk by a German submarine on May 1, 1917, before reaching Liverpool. In the early part of the afternoon of May 1, the weather being hazy, two small objects were sighted by the *Rockingham* at a distance of approximately 5 miles, one on the starboard bow, the other on the port quarter, and assuming that they were German submarines the master steered a zig-zag course in accordance with instructions issued by the United States Navy Department designed to elude the operations of hostile submarines. The two objects were seen to submerge and thereafter were not sighted until after the sinking. The gun crew of the *Rockingham* had, therefore, no target to fire upon, and no effort was made at resistance. The attack was upon the starboard side, was made without warning the torpedo entering the engine room, tearing a great hole in the ship and causing her to sink in 25 minutes.

The German agent contends that the *Rockingham* at the time of her destruction had lost her status as a private peaceful trading ship and had become "naval and military * * * materials" as that term is used

in the treaty because: (1) she was armed, (2) her guns were manned by a naval gun crew, (3) she was operated in accordance with instructions given by the Navy Department of the United States although by a civilian master with a civilian crew. The contention is that, notwithstanding such arming and manning and operation may have been entirely legal and justified, they nevertheless stripped the *Rockingham* of her character of a peaceful merchantman and impressed her with a military character.

This contention must be rejected. It is clear that the *Rockingham* was being privately operated by an American national for private profit. She was armed in pursuance of the policy adopted by the Government of the United States, of which all foreign missions in Washington were given formal notice on March 12, 1917, during the period of American neutrality, in the following language:

Arming of merchant vessels.

"In view of the announcement of the Imperial German Government on January 31, 1917, that all ships, those of neutrals included, met within certain zones of the high seas would be sunk without any precautions being taken for the safety of the persons on board, and without the exercise of visit and search, the Government of the United States has determined to place upon all American merchant vessels sailing through the barred areas an armed guard for the protection of the vessels and the lives of the persons on board."

The instructions given by the Navy Department of the United States to the masters of these merchant vessels and to the commanders of the naval gun crews clearly indicate that the purpose of so arming and operating such vessels was to *protect against* the offensive operations of German submarines and to elude or escape from them if possible, and not to initiate offensive operations against such submarines. The control in the nature of routing instructions which the civilian masters received from the Navy Department and followed was designed to avoid and to escape from the submarine, not to seek them out and destroy them.

The arming for defensive purposes of a merchantman and the manning of such armament by a naval gun crew, coupled with the routing of such ship by the Navy Department of the United States for the purpose of

avoiding the danger of submarines and the following by the civilian master of the ship of instructions given by the Navy Department for the defense of the ship when in danger of attack by submarines, certainly do not change the juridical status of the ship or convert it from a merchant ship to a war ship or make of it naval material.

Decision. The commission holds that the *Rockingham* at the time of her destruction was being operated as a merchant vessel and that she does not fall within the excepted class.

The *Motano*.

Case No. 551, steamship *Motano*—oil tanker

The steamship *Motano*, owned and operated by the Standard Oil Co. of New Jersey, an American national, sailed from New York on July 6, 1917, with a cargo of fuel oil for account of the British ship control for use of the British Admiralty. She left Plymouth with other vessels convoyed by three British destroyers for Portsmouth,

Facts of case. England, as her final discharge port. She was armed for defensive purposes with two 3-inch guns, one fore and one aft, and had a civilian master and crew of 33 men and a gun crew of 13 enlisted men of the United States Navy. She was sunk on July 31, 1917, on her voyage between Plymouth and Portsmouth by a torpedo fired by a German submarine. The air was hazy, the sea choppy, the submarine had not been sighted, and no resistance was made by the naval gun crew. The *Motano* was insured with the British Government for $616,000, which sum has been paid to the claimant, and this claim is made for the difference between that amount and the true value of the vessel, which difference is placed at the sum of $594,000, plus interest and expenses.

The German agent contends that the *Motano* at the time of her destruction constituted "naval * * * works or materials" because (1) she carried armament susceptible of use for hostile purposes and was manned by a naval gun crew, (2) she was convoyed by regular fighting forces of a belligerent power, and (3) she was controlled by the belligerent British Government and used for warlike purposes. The commission rejects this contention because it is apparent that the *Motano* was privately owned and privately operated for private profit, was not employed or designed to be employed directly in furtherance of a military operation of the United States

or its associated powers against Germany or her allies, and was not impressed with a military character.

We have heretofore examined the test of armament manned by a naval gun crew on a privately operated commercial ship and held that it did not have the effect of converting such ship into naval material.

Enemy convoy

The German agent with great earnestness and ability insists that a ship associating itself with a belligerent convoy assumes the character of its associates and that when it becomes a part of the convoy flotilla, which is a military unit and subject to naval instructions and naval control, it participates in hostilities and must be classed as naval material. We have no quarrel with the contention that a vessel, whether neutral or belligerent, forming part of a convoy under belligerent escort may, through the methods prescribed by international law, be lawfully condemned and destroyed as a belligerent. But that is not the question before this commission. If we assume that the *Motano*—a belligerent merchantman—was lawfully destroyed, this does not affect the result. The fact that the *Motano*, because of its helpless and nonmilitary character, sought the protection of a convoy and voluntarily subjected itself to naval instructions as to routing and operation, for the purpose of avoiding the German submarines rather than seeking them out to engage them in combat, certainly can not, by some mysterious and alchemic process, have the effect of transforming the ship from a merchantman into naval material. The control exercised by the British Government over the *Motano* was not such as to affect its status. Such control was limited to directions looking to the protection of the vessel and the furtherance of its commercial activities, and not directly in furtherance of any military operation against Germany for her allies.

Decision.

The commission therefore concludes that the *Motano* at the time of her destruction maintained her character as a peaceful commercial vessel and that she does not fall within the excepted class.

Case No. 29, steamship *Pinar del Rio*

Pinar del Rio.

The steamship *Pinar del Rio*, owned by the American & Cuban Steamship Line (Inc.), an American national, was requisitioned by the United States through the

Shipping Board, and a time-form requisition charter was entered into February 4, 1918. By the terms of this charter the owner became the agent of the Shipping Board and as such continued to operate the ship. She was unarmed and manned by a civilian crew. While en route from Cuba to Boston with a cargo of sugar she was sunk, on June 8, 1918, through gunfire by a German submarine.

It is apparent that at the time of her destruction she was being operated as a merchant vessel and in no sense impressed with a military character. She does not, therefore, fall within the excepted class.

Case No. 550, steamship *Rochester*

The *Rochester*.

The steamship *Rochester*, owned and operated by the Rochester Navigation Corporation, an American national, after having discharged a general cargo at Manchester, England, sailed from that port in ballast October 26, 1917. She was armed for defensive purposes with two 3-inch guns, mounted one fore and one aft, and had a civilian crew of 36 men and a naval gun crew of 13 men. After leaving Manchester she with nine other merchantmen was convoyed for several days by five destroyers and one armed cruiser, and, after the convoying ships returned to their base, the *Rochester* was sunk on November 2, 1917, by a torpedo and shells fired from a German submarine.

It is apparent that the *Rochester* at the time of her destruction was being operated as a merchant vessel and was not in any sense impressed with a military character. The commission, therefore, finds that the *Rochester* does not fall within the excepted class.

Case No. 555, steamship *Moreni*—oil tanker

The *Moreni*.

The steamship *Moreni*, owned and operated by the Standard Oil Co. of New Jersey, an American national, sailed from Baton Rouge, La., May 19, 1917, with a cargo of gasoline consigned to the Italian-American Oil Co., at Savona, Italy, to call at Gibraltar for orders. She was armed for defensive purposes with two 4-inch guns, one fore and one aft, and manned with a civilian crew of 35 and a naval gun crew of 12. After calling at Gibraltar for orders she sailed from that port June 10, 1917, and on the morning of June 12 was fired

upon and finally sunk by a German submarine after a running fight in which the *Moreni* endeavored to escape and in which 200 to 250 shots were fired by the submarine and about 150 shots by the *Moreni*.

It is apparent that the *Moreni* was at the time of her destruction being privately operated for private profit as a merchant vessel, and for the reasons heretofore given the commission holds that she does not fall within the excepted class.

Case No. 549, steamship *Alamance*

The *Alamance*.

The steamship *Alamance*, owned by the Garland Steamship Corporation, an American national, was requisitioned by the Shipping Board October 20, 1917, and at once redelivered to the Garland Steamship Corporation under a time-form requisition charter, executed December 28, 1917, by the terms of which the owner operated the vessel as agent of the Shipping Board. She was manned with a civilian crew of 38 men, armed for defensive purposes with two 4-inch guns, one fore and one aft, which were manned by a naval gun crew of 19 men. On February 5, 1918, while en route from Hampton Roads, Va., to Liverpool, England, with a cargo consisting principally of tobacco, cotton, zinc, and lumber, and while in a convoy of 15 ships escorted by naval vessels, she was torpedoed and sunk by a German submarine.

For the reasons heretofore given the commission holds that at the time of her destruction the *Alamance* was a merchant vessel and that she does not fall within the excepted class.

Case No. 553, steamship *Tyler*

The *Tyler*.

The steamship *Tyler*, owned by the Old Dominion Steamship Co., of New York, an American national, was requisitioned by the Shipping Board November 29, 1917, and a time-form requisition charter executed on January 4, 1918. On March 2, 1918, the Shipping Board entered into an operating agreement with Chase Leaveth & Co. by the terms of which they operated the *Tyler* as agent of the Shipping Board, and she was being so operated at the time of her destruction. She was manned by a civilian crew, armed for defensive purposes with two 3-inch guns, one fore and one aft, which were manned by a naval gun crew of 19 men. On April 30, 1918, the

Tyler left Genoa, Italy, in convoy, bound for New York in ballast. On May 2, 1918, she was sunk by torpedoes fired by a German submarine.

For the reasons hereinabove given the commission holds that at the time of her destruction the *Tyler* was a merchantman in no sense impressed with a military character, and hence is not within the excepted class.

Case No. 554, steamship *Santa Maria*—oil tanker

The *Santa Maria.*

The steamship *Santa Maria*, owned by the Sun Co., an American national, was requisitioned by the Shipping Board October 12, 1917, delivered on January 14, 1918, and on the same day redelivered to the owner, which operated her as agent of the Shipping Board under a requisition agreement constituting a part of the requisition charter. She sailed from Chester, Pa., the latter part of January, 1918, via Norfolk, Va., bound for Great Britain in convoy with a cargo of fuel oil. She was manned by a civilian crew of 39 men, armed with two 4-inch guns, one fore and one aft, and had a naval gun crew of 22 men. On February 25, while under convoy of British trawlers, she was sunk by a torpedo fired by a German submarine.

The commission holds that at the time of her destruction the *Santa Maria* was a merchant vessel and that she does not fall within the excepted class.

Case No. 552, steamship *Merak*

The *Merak.*

By virtue of a proclamation of the President of the United States of March 20, 1918, 87 vessels of Holland registry and belonging to her nationals, lying in American ports, were, in accordance with international law and practice, requisitioned by the United States, the President in his proclamation directing that the Shipping Board "make to the owners thereof full compensation, in accordance with the principles of international law." Of these vessels 46, including the steamships *Merak* and *Texel*, were delivered to the Shipping Board.

The *Merak* was operated as a merchantman by Wessel Du Val & Co., American nationals, as agents of the Shipping Board. She sailed under the American flag, was unarmed, and was manned by a civilian crew. While en route from Norfolk, Va., to Chile with a cargo of 4,000 tons of coal she was, on August 6, 1918, captured by a German submarine and sunk by bombs.

Case No. 556, steamship *Texel*

The *Texel*.

As appears from the statement made in connection with the *Merak* case *supra*, the steamship *Texel* was one of the Dutch ships requisitioned by the United States and assigned to the Shipping Board, after which she was operated by the New York & Porto Rico Steamship Co. as agent for the Shipping Board. She was unarmed and manned by a civilian crew. She sailed under the American flag from Ponce, P. R., on May 27, 1918, for New York with a cargo of sugar. On June 2, she was attacked by a German submarine, overhauled, and sunk by bombs.

It is apparent that the steamships *Merak* and *Texel* were at the time of their destruction being operated as merchant vessels and in no sense impressed with a military character. For the reasons heretofore given the commission holds that neither the steamship *Merak* nor the steamship *Texel* falls within the excepted class, and that neither can in any sense be held to have constituted "naval and military works or materials" as that phrase is used in the treaty.

"Belonging to."

But notwithstanding this holding the German agent contends that these claims do not fall within the terms of the treaty of Berlin because these Dutch ships were not vessels "*belonging to*" the United States or its nationals as that term is used in the paragraph 9 here under consideration. That these ships were lawfully requisitioned, reduced to possession, and operated by the United States is conceded by Germany. It results that at the time of their destruction the right of the United States to possess and use them against all the world was absolute and superior to any possible contingent rights or interests of those Dutch nationals who owned them at the time they were requisitioned. That the United States had at least a special or qualified property in these ships there can be no doubt. They were lawfully in its possession, sailing under its flag, used as it saw fit without regard to the wishes of the former owners and during an emergency the duration of which the United States alone could determine. There never was a time when the Dutch nationals who owned the ships at the time they were requisitioned could, as a matter of right, demand their return or impose any limitation whatsoever upon their operation or control. As the United States had the absolute right against the whole world to possess these ships and use them as it

saw fit, conditioned only upon the duty to make adequate compensation for their use and to return them, at a time to be determined by it or in the alternative to make adequate compensation, to the Dutch nationals who owned them at the time they were requisitioned, certain it is that this amounted to a special or qualified property in the ships tantamount to absolute ownership thereof for the time being. The possession of the United States was analagous to that of a grantee having an estate defeasible upon the happening of some event completely within his control.

Where under the terms of a trip or time charter the holder of the legal title delivers to the charterer the whole possession and control of the ship, the charterer becomes the "owner" thereof during the term of the charter and is designated as such.[35] The British merchant shipping (salvage) act, 1916, provides that: "Where salvage services are rendered by any ship *belonging to His Majesty* * * * the Admiralty shall * * * be entitled to claim salvage * * * and shall have the same rights and remedies as if the ship * * * did not belong to His Majesty." The English courts have held that a ship requisitioned and operated by the government under requisition charter "belonged to" His Majesty within the terms of this act and hence was entitled to salvage.[36] These decisions while helpful are not controlling in construing the phrase "Damage in respect of all property wherever situated *belonging to*" the United States or its nationals. "Belonging to" as here used is not a term of art or a technical legal term. It must be construed in the popular sense in which the word is ordinarily used, as synonymous with appertaining to, connected with, having special relation to. That it was used in this sense is evidenced by reference to this clause of the French text of the treaty of Versailles, which reads: "Dommages relatifs à toutes propriétés, en quelque lieu qu'elles soient situées, appartenant à." The use of the word "appartenant" is significant. The expression "belonging to" does not necessarily convey the idea that

[35] *Sandeman* v. *Scurr* (1866), L. R. 2 Q. B. 86; *Marcardier* v. *Chesapeake Insurance Co.* (1814), 8 Cranch 39, 49; *Reed* v. *United States* (1871), 11 Wallace 591, 600; *Leary* v. *United States* (1872), 14 Wallace 607, 610; Kent's Commentaries, 14th edition, Vol. III, p. *138; Scrutton, Charterparties and Bills of Lading, 11th (1923) edition, art. 2, pp. 4–9.

[36] *Admiralty Commissioners* v. *Page and others* (1918), 2 K. B. 447, affirmed in (1919) 1 K. B. 299. See also *The Sarpen*, Court of Appeal (1916), Probate Division, 306, 313; *Master of Trinity House* v. *Clark* (1815), 4 M. & S. 288.

the indefeasible legal title to the property "in respect of" which the damage occurred must have vested in the United States or its nationals. It is sufficient that the United States or its nationals had such control over and interest, general or special, in such property as that injury or damage to it directly resulted in loss to them. Had the draftsmen of the treaty intended to restrict Germany's obligations to pay for damages to property in which the unconditional legal title was vested in the allied or associated States or their nationals, they would have used apt and well-recognized terms to express such limitation. On the contrary, it is evident from reading the reparation provisions as a whole that their purpose and intention was to require Germany to pay all losses sustained by the allied or associated States or their nationals resulting from "damage in respect of all property wherever situated" of a nonmilitary character.

While not controlling, it is interesting to note that the Reparation Commission has placed a similar construction on the language in question, and gone a step farther than here indicated in holding that "Time chartered neutral vessels in respect of which compensation was paid by the claiming power might also be included [in computing the amount of Germany's reparation payments under paragraph 9 of Annex I], though not sailing under the flag of the power in question."

Decision.

It follows that the claims for losses resulting from the destruction of the steamships *Merak* and *Texel* fall within the terms of the treaty of Berlin and that Germany is obligated to compensate for their loss.

Case No. 546, steamship *John G. McCullough*

The *McCullough*.

The steamship *John G. McCullough*, owned by the United States Steamship Co., an American national, was requisitioned by the United States through the Shipping Board November 6, 1917, under a bare-boat requisition charter. On the same day she was delivered she was turned over to the War Department of the United States and operated with a British civilian crew, 32 in number, employed and paid by and in all things subject to the orders of the United States War Department. Under the requisition charter she thereupon became a public ship.

She was armed with one *French* 90 mm. gun, which was manned by a *British* naval crew of two gunners.

While en route, May 18, 1918, from London, England, in naval convoy to Rochefort, France, with a general cargo *for the Army of the United States*, she was destroyed, either by a torpedo from a German submarine, as claimed by the American agent, or by a mine, which may or may not have been of German origin. The German agent denies that she was torpedoed by a German submarine. The German Admiralty is without information with respect to her destruction. There is, however, evidence supporting the allegation that she was torpedoed; but in view of the disposition which the commission will make of this case the cause of her destruction is not material.

Public ship.

At the time the *McCullough* was destroyed she was a public ship in the possession of and operated by the United States through its War Department, one of the military arms of the Government whose every effort was concentrated on mobilizing and hurling men and munitions against Germany. She had been requisitioned in European waters. America's associates in the war had assisted in manning and equipping her. France had supplied armament and Great Britain had supplied a naval gun crew. She was transporting from England to France supplies for the active fighting forces of the Army of the United States. She possessed every indicia of a military character save that she was not licensed to engage in *offensive* warfare against enemy ships. Offensive operation on the seas was not her function. The fact that the legal title to her had not vested in the United States is wholly immaterial. She was in the possession of the United States. It had the right against all the world to hold, use, and operate her and was in fact operating her through its War Department by a master and crew employed by and subject in every respect to the orders of the War Department. She was actively performing a service for the Army on the fighting front. She possessed none of the indicia of a merchant vessel. The very requisition charter under which she was operating took pains to declare her a "public ship" and not a merchant vessel subject to the laws, regulations, and liabilities as such as was the *Lake Monroe*.[37] She was at the time of her destruction being utilized for "other * * * military purposes" within the meaning of that phrase as used in section 5 of the shipping act. She was impressed with a military character.

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[37] The *Lake Monroe*, (1919) 250 U. S. 246.

The taxicabs privately owned and operated for profit in Paris during September, 1914, were in no sense military materials; but when these same taxicabs were requisitioned by the military governor of Paris and used to transport French reserves to meet and repel the oncoming German Army they became military materials, and so remained until redelivered to their owners. The automobile belonging to the United States assigned to its President and constitutional commander in chief of its Army for use in Washington is in no sense military materials. But had that same automobile been transported to the battle front in France or Belgium and used by the same President, it would have become a part of the military equipment of the Army and as such impressed with a military character. The steel rails used in the yards of a steel plant in Pittsburgh for shifting war materials from one part of the plant to another are not impressed with a military character, for they are privately operated for private profit. But if these same rails had been taken up and shipped to the American Army in France and laid by it as a part of its transportation system, used and operated by it for transporting munitions and supplies to the fighting front, they would then have become military materials.

Decision.

So here the *McCullough*, by the terms of her requisition charter stamped a "public ship," actively engaged in transporting Army supplies to the battle front, operated by the War Department of the United States through a crew employed and paid by it and subject in all things to its orders, was at the time of her destruction "military materials" and not property for which Germany is obligated to pay under the provisions of the treaty of Berlin.

Case No. 547, steamship *Joseph Cudahy*—oil tanker

The *Joseph Cudahy*.

The steamship *Joseph Cudahy*, an oil tanker, owned by the American Italian Commercial Corporation, of New York, an American national, was requisitioned by the United States through the Shipping Board on October 3, 1917, and on the same day delivered to the War Department and operated by the United States Army Transport Service under a bare-boat charter by a civilian crew employed and paid by and in all things subject to the orders of the Army authorities. She was armed with two 3-inch guns. Her armament was manned by a United States naval crew of 21 men. She had carried

a cargo of gasoline and naphtha for the United States Army from Bayonne, N. J., calling first at La Pollice, France, and then to Le Verdon, and discharged her cargo at Furt, Gironde River. She sailed from Le Verdon in ballast on her return trip to New York on August 14, 1918, in convoy with 28 other vessels. The convoy broke up during the night of August 15. She was torpedoed by a German submarine and sunk on the morning of August 17.

The fact that she was in ballast at the time of her destruction is immaterial. Being a tank ship operated by and for the exclusive use of the Army Transport Service of the United States, her return in ballast for additional supplies of gasoline and naphtha for the United States Army on the fighting front was an inseparable part of her military operations.

For the reasons set out in connection with the destruction of the *John G. McCullough* the commission holds that the *Joseph Cudahy* at the time of her destruction was impressed with the character of "military materials" and that the loss suffered by the United States resulting from her destruction is not one for which Germany is obligated to pay under the terms of the treaty of Berlin.

Case No. 548, steamship *A. A. Raven*

The *Raven.*

The steamship *A. A. Raven*, owned by the American Transportation Co. (Inc.), an American national, was requisitioned by the United States through the Shipping Board, and a bare-boat requisition charter was executed on February 19, 1918. She was delivered to and operated by the War Department with a civilian crew employed and paid by and in all respects subject to the orders of the War Department. She was armed with two 3-inch guns but had no armed guard at the time of her loss. While en route in convoy on March 14, 1918, from Barry, England, to Brest, and thence to Bordeaux, France, she was sunk. The German Admiralty has no record of her having been torpedoed by a German submarine as claimed by the American agent. As pointed out by the German agent, she may possibly have struck a mine adrift from fields planted by the Netherlands Government along the Dutch coast not far from the point where the *A. A. Raven* was sunk. The evidence that she was torpedoed, while far from satisfactory, is sufficient to support the allegation.

However, in view of the disposition which the commission will make of this case the cause of her destruction is immaterial.

At the time of her destruction she had a cargo of food, clothing, surgical instruments, hospital supplies, piping, and rails and 400 tons of explosives, all belonging to the United States and all designed for the use of the American Army in France.

Decision.

For the reasons set forth in connection with the case involving the loss of the *John G. McCullough* the commission holds that the steamship *A. A. Raven* was at the time of her destruction impressed with a military character and that the resultant loss to the United States is not one for which Germany is obligated to pay under the terms of the treaty of Berlin.

From the foregoing the commission deduces the following general rules with respect to the tests to be applied in determining when hull losses fall within the excepted class of "naval and military works or materials" as that phrase is found in paragraph 9 of Annex I to Section I of Part VIII of the treaty of Versailles as carried by reference into the treaty of Berlin:

General rules for hull losses.

I. In order to bring a ship within the excepted class she must have been operated by the United States at the time of her destruction for purposes directly in furtherance of a military operation against Germany or her allies.

II. It is immaterial whether the ship was or was not owned by the United States; her possession, either actual or constructive, and her use by the United States in direct furtherance of a military operation against its then enemies constitute the controlling test.

III. So long as a ship is privately operated for private profit she can not be impressed with a military character, for only the government can lawfully engage in direct warlike activities.

IV. The fact that a ship was either owned or requisitioned by the Shipping Board or the Fleet Corporation and operated by one of them, either directly or through an agent, does not create even a rebuttable presumption that she was impressed with a military character.

V. When, however, a ship, either owned by or requisitioned by the United States during the period of belligerency, passed into the possession and under the operation of either the War Department or the Navy

Department of the United States, thereby becoming a public ship, her master, officers, and crew all being employed and paid by and subject to the orders of the United States, it is to be presumed that such possession, control, and operation by a military arm of a government focusing all of its powers and energies on actively waging war, were directly in furtherance of a military operation. Such control and operation of a ship will be treated by the commission as *prima facie*, but not conclusive, evidence of her military character.

VI. Neither (*a*) the arming for defensive purposes of a merchantman, nor (*b*) the manning of such armament by a naval gun crew, nor (*c*) her routing by the Navy Department of the United States for the purpose of avoiding the enemy, nor (*d*) the following by the civilian master of such merchantman of instructions given by the Navy Department for the defense of the ship when attacked by or when in danger of attack by the enemy, nor (*e*) her seeking the protection of a convoy and submitting herself to naval instructions as to route and operation for the purpose of avoiding the enemy, nor all of these combined, will suffice to impress such merchantman with a military character.

VII. The facts in each case will be carefully examined and weighed and the commission will determine whether or not the particular ship at the time of her destruction was operated by the United States directly in furtherance of a military operation against Germany or her allies. If she was so operated she will fall within the excepted class, otherwise she will not.

The preliminary submissions of the 13 cases specifically dealt with in this opinion will not be held a waiver of the right of either the American agent or the German agent to file in any of them additional proofs bearing on the points decided. Such additional proofs if filed will be considered by the commission on the final submission, when the principles and rules herein announced will be applied and final decisions rendered. In the absence of further evidence, the interlocutory decisions herein rendered in each of these 13 cases will become final.

Done at Washington, March 25, 1924.

EDWIN B. PARKER,
Umpire.

Concurring in the conclusions:

W. KIESSELBACH,
German Commissioner.

I concur in the conclusions generally, but not in the conclusions that on the facts stated with reference to the *Joseph Cudahy* she was impressed with the character of "military and naval works or materials" within the meaning of that phrase as used in the provisions of the treaty of Versailles under consideration.

One of the conclusions concurred in is that the control and operation of a vessel by the War Department of the United States for Army service, as was the case with the *Joseph Cudahy*, constitutes *prima facie* but not conclusive evidence of her military character.

Another conclusion concurred in is that in order to bring a vessel within the excepted class she must have been operated by the United States at the time of her destruction "for purposes directly in furtherance of a military operation against Germany or her allies."

Return voyage.

On the facts stated, the *Joseph Cudahy* was returning home from France to the United States in ballast at the time of her destruction, so that she was not being operated at that time "for purposes directly in furtherance of a military operation against Germany or her allies." Accordingly the presumption arising from her control and operation by the War Department is completely rebutted by her actual use and situation at the time of her destruction.

CHANDLER P. ANDERSON,
American Commissioner.

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